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SUPREME COURT OF THE UNITED STATES

Paul Kern Imbler,

Petitioner,

v.

Richard Pachtman,

District Attorney,

Respondent

No. 74-5435

October Term 1974

(District Attorney Immunity under 42 U.S.C. 1983 lawsuits with conflict in the Circuits)

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

Paul Kern Imbler,
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No. _____

October Term 1974

(District Attorney Perjury and Alleged Immunity under 42 U.S.C. 1983 lawsuit, with conflict in the Circuits)

To the Honorable Warren E. Burger, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now Paul Kern Imbler, by his attorney Roger S. Hanson, a member of the Bar of this Honorable Court, and petitions for a Writ of Certiorari to review that certain 2-1 decision of the United States Court of Appeals for the Ninth Circuit entered July 12, 1974 affirming a decision of the United States District Court for the Central District of California, dismissing petitioner-plaintiff's suit brought under 42 U.S.C. 1983, the Federal Civil Rights Act, against the defendant Richard Pachtman, a Los Angeles County District Attorney.

A petition for rehearing and a suggestion for hearing En Banc was made and was rejected September 10, 1974, by the United States Court of Appeals for the Ninth Circuit, the Honorable John F. Kilkenny, Senior United States Circuit Judge voting for a rehearing and for a suggested hearing en banc. A copy of the order denying a rehearing, et al. entered September 10, 1974 is herewith attached to this

petition for certiorari.

Jurisdictional Statement

The grounds upon which the jurisdiction of this Court is invoked are 28 U.S.C. Section 1254(1). The other grounds upon which the jurisdiction of this case is invoked are a severe and clear-cut conflict of decisions in the various circuit courts of appeals in the United States. A further ground upon which the jurisdiction of this Honorable Court is invoked is a denial of equal protection of the law and deprivation of rights to bring a lawsuit under 42 U.S.C. 1983 in the courts governed by the United States Ninth Circuit, whereas had petitioner been able to bring his lawsuit in the Fourth, Fifth, Sixth, Seventh, or Eighth Circuit, his cause of action would not have been dismissed under the allegations of the complaint. The jurisdiction is further invoked under this Court's power to resolve critical issues of national importance.

Opinion Below

The opinion below is as yet unpublished, but a copy of it is herewith attached. The federal opinion granting petitioner Paul Kern Imbler's Writ of Habeas Corpus under 28 U.S.C. 2254 entitled Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969), upon which the 42 U.S.C. 1983 lawsuit was based, is herewith attached, containing the findings of fact and conclusions of law. The said opinion, 298 F. Supp. 795 (C.D. Calif. 1969) granted petitioner Paul Kern Imbler a Federal Writ of Habeas Corpus because of, inter alia, the knowing use of perjured testimony on the part of the defendant District Attorney Richard Pachtman, said perjured testimony contributing to the conviction of Paul Kern Imbler for first

degree murder, and said perjured testimony causing him to be sentenced to death by lethal gas in the California gas chamber in the State Penitentiary at San Quentin.

Petitioner Imbler seeks certiorari under 28 U.S.C. 1254(1).

The district court opinion dismissing petitioner's suit against District Attorney Richard Pachtman is unpublished, and is herewith attached as part of this petition for writ of certiorari.

Reasons for Granting Certiorari and Issues to be Resolved

(1) To resolve and define on a national level the recurring issue and problem of the liability of a District Attorney to a lawsuit brought against him under the Federal Civil Rights Act, 42 U.S.C. 1983, and related statutes, an issue never fully considered and adjudicated by this Honorable Court.

(2) To resolve whether the knowing use of perjured testimony by a Deputy District Attorney to obtain a conviction for first degree murder and sentence of death is an act for which that Deputy District Attorney shall receive carte blanche immunity under 42 U.S.C. 1983, disenabling his victim from bringing a Federal Civil Rights Lawsuit for money damages.

(3) To resolve the conflict which now exists in the United States Court of Appeals for several of the federal circuits which have considered the above issue and which have rendered conflicting opinions, within the meaning of Rule 19 , Rules of the Supreme Court of the United States.

(4) To decide whether when, as here, a Federal Writ of Habeas Corpus has already been granted in the instant case for the knowing use of perjured testimony on the part of a Los Angeles County Deputy District Attorney by a United States

District Judge, and affirmed by the Ninth Circuit, it is appropriate to dismiss before trial, on the filed pleadings petitioner's lawsuit against the Deputy District Attorney brought under 42 U.S.C. 1983 and related statutes.

(5) To decide whether a Deputy District Attorney, an arm of the executive branch of state and county government, shall any longer be accorded any immunity under 42 U.S.C. 1983 following the decision of this Honorable Court in Scheuer v. Rhodes, ___ U.S. ___ , ___ S.Ct. ___ , ___ L.Ed.2d ___ , 42 U.S.L.W. 4543, April 17, 1974.

(6) To decide whether the knowing use of perjured testimony by a Deputy District Attorney to achieve a conviction for murder in the first degree with a resulting death sentence is an act within the normal prosecutorial function or role of a prosecuting attorney such as to insulate the said district attorney from a Federal Civil Rights lawsuit brought under 42 U.S.C. 1983 and related sections.

(7) To determine whether petitioner Paul Kern Imbler is receiving equal protection of the law in the Federal Ninth Circuit when his suit against a Deputy District Attorney under 42 U.S.C. 1983 is dismissed, whereas had the Deputy District Attorney carried out his dastardly act of knowingly using perjury in another Federal Circuit the said act would provide a basis for a cause of action, citing in particular the Sixth Circuit decision Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) allowing said lawsuit; said 6th Circuit decision, Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) is herewith appended for the convenience of this Honorable Court in support of the assertion that a severe conflict now exists in the Federal Circuits.

(8) Whether, if the asserted "immunity" enjoyed by a District Attorney stems from an alleged "quasi-judicial"

position occupied by a District Attorney, a judge should be given immunity in any case where he knowingly suffers or allows perjured testimony to occur in his courtroom in any criminal proceeding; whether if such a judge who knowingly suffers or allows perjury to occur in his court when offered by the prosecution should not receive immunity, whether then a District Attorney should be granted "quasi-judicial" immunity.

(9) Whether a violation of federal civil rights, a cause of action against a Deputy District Attorney under 42 U.S.C. 1983 should be allowed to stand, at least under the limited circumstances present in the case at bar, where:

a. the District Attorney has already been found by a United States District Judge to have knowingly used perjured testimony to convict the petitioner Paul Kern Imbler, 298 F. Supp. 795 (C.D. Calif. 1969);

b. this finding was made during procedures leading to the grant of a petition for writ of habeas corpus under 28 U.S.C. 2254 for, inter alia, the knowing use of perjured testimony to convict the petitioner Paul Kern Imbler, on the part of the defendant herein, Deputy District Attorney Richard Pachtman.

(10) Whether the knowing use of perjured testimony by a Deputy District Attorney shall be protected from liability to suit against the District Attorney by the victim of that perjury in a Federal Civil Rights suit under 42 U.S.C. 1983.

(11) Whether, in view of the substantial number of cases now in record involving 42 U.S.C. 1983 lawsuits against District Attorneys in the Federal Circuit Courts of Appeals reaching conflicting results, this Honorable Court should

finally resolve the conflict of authority now existing between the Ninth Circuit and such other circuits as the Fifth, Sixth, and Seventh Circuits.

Statement of Facts

Petitioner Paul Kern Imbler was convicted of murder in Los Angeles Superior Court in 1961. He was sentenced to death. The California Supreme Court affirmed. People v. Imbler, 57 C.2d 711 (1962). Imbler then filed a petition for Writ of Habeas Corpus in the California Supreme Court. That court issued an Order to Show Cause and an evidentiary hearing was held looking into the allegations that the conviction was obtained by the prosecution by the knowing use of perjured testimony, the prosecution being aware of the perjury and neglecting to correct same. Ignorning some of the evidentiary facts developed, the California Supreme Court acknowledged that perjury occurred but erroneously ruled that the prosecution was not aware of it. The writ was denied and petitioner Imbler was resentenced to death. In Re Imbler, 60 C.2d 554. A subsequent Writ of Habeas Corpus resulted in the death sentence being set aside for prosecution errors condemned by the People v. Morse, (60 C.2d 631) decision of the California Supreme Court. In Re Imbler, 61 C.2d 556 (1964).

Imbler then commenced Federal Habeas Corpus under 28 U.S.C. 2254 realleging prosecution perjury. Originally filed in the Eastern District of California, the petition was transferred to the Central District of California, where United States District Judge Warren J. Ferguson granted the Writ of Habeas Corpus for, inter alia, the knowing use by the prosecution of perjured testimony. Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969), a copy of which is herewith

attached. The Ninth Circuit affirmed the granting of the writ. Imbler v. Craven, 424 F.2d 631 (9th Cir. 1970).

This Honorable Court denied certiorari, sought by the People, 400 U.S. 865. The prosecution declined to retry petitioner Imbler, and he was released after spending some 10 years in prison, four of which were spent on Death Row.

In 1971, the instant Federal Civil Rights suit was brought against District Attorney Richard Pachtman, who prosecuted Imbler, under 42 U.S.C. 1983, for money damages, for his knowingly using perjury to convict petitioner Imbler. The suit against District Attorney Pachtman was dismissed because of asserted "immunity" that a District Attorney supposedly "enjoys." The United States Court of Appeals affirmed this dismissal, Imbler v. Pachtman, ____ F.2d ____ as yet unpublished, (9th Cir. 1974), and a petition for rehearing and a suggestion for a hearing en banc was rejected on September 10, 1974. A copy of that order is herewith attached, as is the Ninth Circuit opinion affirming the dismissal.

The opinion affirming the dismissal was a 2-1 vote of the Ninth Circuit and once again reaffirmed the Ninth Circuit theory that District Attorneys are to be given full immunity for any illegal or unconstitutional behavior or deprivation of civil rights of any defendant upon whom they perform their prosecutorial function. Ney v. State of California, 439 F.2d 1285 (9th Cir. 1971); Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964), as long as the act of the District Attorney was done within his "prosecutorial function."

The dissent by United States Circuit Judge John F. Kilkenny not only disagreed with the immunity given the District Attorney for his knowing use of perjury to convict Paul Kern Imbler, but pointed out several federal decisions

reaching a contrary result from other circuits. In addition to those cited late contrary decisions, other circuits have reached contrary results, and the same are cited elsewhere in this petition.

The best indication by this Honorable Court that these pseudo-asserted "privileges" against 42 U.S.C. 1983 lawsuits are not to be accorded to certain classes of persons is Scheuer v. Rhodes, ____ U.S. ____, April 17, 1974, and, in addition, the denial of certiorari in Shaw v. Garrison, a suit upheld by the Fifth Circuit against District Attorney James Garrison of New Orleans by one Clay Shaw. The United States District Court in Louisiana declined to dismiss the suit, and upon certification to the Fifth Circuit, that court as well declined to dismiss the suit. Upon seeking review in this Honorable Court, this Honorable Court declined to review the order denying dismissal against District Attorney Garrison because of some asserted immunity enjoyed by a District Attorney. 409 U.S. 1029, noted in the dissent in the case now at bar by Ninth Senior Circuit Judge John F. Kilkenny.

We thus offer for national resolution the critical issue of the scope of immunity to be accorded District Attorneys for suits against them under the Federal Civil Rights Act, 42 U.S.C. 1983, with the added reason for granting certiorari the necessity to resolve a clear-cut conflict of result in decisions on this issue from the various United States Circuit Courts of Appeals.

We feel that clear decisions in the Fourth, Fifth, Sixth, Seventh and Eighth Circuits have resolved the issue now before this Court in the direction of allowing the maintaining of such a cause of action under 42 U.S.C. 1983 against a District Attorney. The Ninth Circuit is thus clearly and modernly "out of step" with the other major

circuits, calling for a resolution of this conflict by this Honorable Court.

It is true that this Honorable Court has never resolved this critical issue, Holton v. Boman, 493 F.2d 1176, 1177, fn. 2 (7th Cir. 1974), and the multiplicity of cases going both ways suggests that the matter must now be resolved.

We have before this Court as petitioner Paul Kern Imbler, who was granted a Federal Writ of Habeas Corpus under 28 U.S.C. 2254 for the very reason that defendant District Attorney Richard Pachtman knowingly used and suffered perjured prosecution evidence and testimony to be used to convict him of murder and sentence him to death in 1961. Petitioner Imbler served 10 years in State Prison, four of them on Death Row.

We offer for national resolution the simple question whether the knowing use of perjured testimony by a prosecutor is "within the scope of his prosecutorial function" so as to insulate him from liability under a Federal Civil Rights lawsuit brought under 42 U.S.C. 1983, where, specially, as here, there has already been a grant of a Writ of Habeas Corpus on the facts in the case by a distinguished United States District Judge after a thorough study of the records in the case. Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969).

We assert that the knowing use of perjury by a state prosecutor has been so thoroughly condemned in decisions of this Honorable Court, Mooney v. Holohan, 284 U.S. 103, Giles v. Maryland, 386 U.S. 66, Napue v. Illinois, 360 U.S. 264, Alcorta v. Texas, 355 U.S. 24, Hysler v. Florida, 315 U.S. 411, Pyle v. Kansas, 317 U.S. 213, Miller v. Pate, 387 U.S. 1, Giglio v. United States, 405 U.S. 150, and DeMarco v. United States, ____ U.S. ____, 39 L.Ed.2d 501 (1974), that it can

not be seriously contended that such behavior is within the normal prosecutorial function of a Deputy District Attorney. Yet, in the case now at bar, the United States Ninth Circuit, with two judges so stating, believes that as long as the behavior occurs during the trial as an "integral part of the prosecution act," it is not actionable. Since other circuits hold that it is actionable under 42 U.S.C. 1983, a severe equal protection problem is created and now should be resolved. Realistically, United States Circuit Judge John F. Kilkenny in dissent, citing the national authority from other circuits, found a valid cause of action.

We pray that certiorari be granted to resolve this important national issue, upon which the major United States Circuit Courts of Appeal are now in conflict.

Argument in Support of Grant of Petition for Writ of Certiorari

I

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO RESOLVE ON A NATIONAL BASIS THE SCOPE OF IMMUNITY TO BE ACCORDED TO A DEPUTY DISTRICT ATTORNEY UNDER THE FEDERAL CIVIL RIGHTS ACT, 42 U.S.C. 1983, AND RELATED STATUTES, WHERE THAT DEPUTY DISTRICT ATTORNEY HAS KNOWINGLY USED PERJURED TESTIMONY TO CONVICT A CRIMINAL DEFENDANT, THIS PETITIONER, AND WHERE A FEDERAL WRIT OF HABEAS CORPUS UNDER 28 U.S.C. 2254 WAS SPECIFICALLY GRANTED FREEING THIS PETITIONER FOR SAID ILLEGAL USE OF PERJURED TESTIMONY ON THE PART OF THE DEPUTY DISTRICT ATTORNEY, IMBLER V. CRAVEN, 298 F. Supp. 795 (C.D. Calif. 1969), AFFIRMED, 424 F.2d 631 (9th Cir. 1970), Cert. denied, 400 U.S. 865.

The scope of immunity to be "enjoyed" by a state prosecutor to a Federal Civil Rights suit brought against

him by a person who has been deprived of his civil rights by that prosecutor has not been defined by this Honorable Court. It should be so defined by a major opinion.

On March 28, 1974, in Holton v. Boman, 493 F.2d 1176, 1177, fn. 2 (7th Cir. 1974), the United States Court of Appeals for the Seventh Circuit noted, inter alia, that

> "...As of the date of this opinion the Supreme Court has not yet defined the scope of immunity enjoyed by a state prosecutor..."

Somewhat earlier, on August 24, 1973, in Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973), the Seventh Circuit observed that

> "The scope of immunity enjoyed by a state prosecutor has not yet been defined by the Supreme Court."

We offer in this petition for certiorari a full opportunity to define the scope of immunity to be "enjoyed" by the nation's prosecutors.

At the District Court level, suit was brought by the petitioner Paul Kern Imbler against a Los Angeles County Deputy District Attorney, Richard Pachtman, for money damages under the Federal Civil Rights Acts, 42 U.S.C. 1983, alleging that District Attorney Pachtman had knowingly used perjured testimony to convict Imbler and sentence him to death in the California gas chamber in 1960. Importantly, the United States District Court for the Central District of California, Honorable Warren J. Ferguson, United States District Judge, had granted a Federal Writ of Habeas Corpus freeing Imbler after 10 years in prison, inter alia, for the knowing use of perjury on the part of the Deputy District Attorney, and among other reasons, including wilful suppression of evidence by the entire prosecution team. Imbler v. Craven,

298 F. Supp. 795 (C.D. Calif. 1969), a copy of which is herewith attached to this petition for certiorari.

Thus, unlike almost all federal civil rights suits brought under 42 U.S.C. 1983, the instant suit was supported by a Federal District Court decision already establishing the allegations made in the federal civil rights complaint. 298 F. Supp. 795.

We present for resolution by this Honorable Court whether a state prosecutor should be clothed with a cloak of immunity for violating his oath of office in engaging in the nondiscretional act of knowingly and premeditatively using, and gathering evidence to use, perjurious testimony to achieve a conviction in a capital trial for first degree murder, when suit is brought against him under 42 U.S.C. 1983 and related statutes of the Federal Civil Rights Act.

We contend, and ask resolution of, that a District Attorney shall not be clothed with such immunity when he engages in the prohibited act of knowingly using perjury to achieve a conviction for murder and resulting death sentence, where such decision is obviously not one that he can exercise discretion about, but is forbidden by his oath and forbidden by decisions of this Honorable Court. Mooney v. Holohan, 284 U.S. 103; Giles v. Maryland, 386 U.S. 66; Napue v. Illinois, 360 U.S. 264; Alcorta v. Texas, 355 U.S. 24; Hysler v. Florida, 315 U.S. 411; Pyle v. Kansas, 317 U.S. 213; Miller v. Pate, 387 U.S. 1; Giglio v. United States, 405 U.S. 150; DeMarco v. United States, ——— U.S. ——— , 39 L.Ed.2d 501 (1974).

It is too well established to require more than passing comment to observe that the nation's prosecutors not only do not have "discretion" to use perjured testimony to achieve a conviction, but on the contrary they are absolutely forbidden

to do so. Wilful suppression of key evidence is fully equivalent. Brady v. Maryland, 373 U.S. 83.

At 298 F. Supp. 795, 806, the Federal Habeas Corpus decision granting relief to this petitioner, Paul Kern Imbler, United States District Judge Warren J. Ferguson ruled and found:

> "As set forth above, Costello's testimony was materially false in at least six respects. As to his false statement that he was 'voluntarily' committed to a certain state hospital in 1946, when in fact he was committed because he had been adjudicated insane, this court finds that the prosecuting attorney had actual and definite knowledge that such statement was false. He not only permitted that statement to stand, an act itself expressly prohibited by Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), but he purposely and intentionally led the witness to make it. Twice in his questioning, the prosecutor himself referred to the commitment as 'voluntary,' although his testimony at the hearing establishes that he indeed knew better. His justification for using that terminology, to be consistent with the witness' understanding of the situation, finds no basis in the law. Where a prosecutor knowingly permits false evidence to be introduced in a trial, and such evidence will inevitably create a false impression in the minds of the jury, no legal justification for that misrepresentation can exist. If the prosecutor wished to avoid for the sake of convenience the term 'involuntary,' he could have readily done so;

> there was absolutely no necessity for a substitute adjective, and use of an erroneous one was highly improper. The prosecutor also stated that he intended to let the jury 'decide' with respect to the voluntariness of the commitment, having presented to them the 'facts.' The one fact, however, which he had, and which the jury did not, was that the commitment was not voluntary."

Further, United States District Judge Ferguson found that the prosecutor had personal knowledge of other falsehoods; at 298 F. Supp. 798, 807, the District Court found:

> "The fact that Costello had been convicted of more than one felony was also known to the prosecuting attorney. He admittedly examined the witness' 'make sheet,' which indicated at least two others. At the state hearing the prosecutor somewhat evasively testified that he had examined the 'make sheet,' but stated he had looked at 'as a whole,' and not to its specific parts. Respondent cannot deny knowledge of facts which it had before it and which its agent admittedly examined. That the agent may have ignored those facts does not relieve the state of its responsibility. This is not mere negligence in failing to ascertain the facts. It is, at best, deliberate failure to take full notice of their significance. Thus, this case is vastly different from Taylor v. United States, 229 F.2d 826 (8th Cir.), cert. denied, 351 U.S. 986, 76 S.Ct. 1055, 100 L.Ed. 1500 (1956), in which petitioner attempted to charge the prosecution with 'implied' knowledge of the contents of certain

Narcotics Bureau records which allegedly would have refuted what a witness told Narcotics Agents. Here, petitioner need not rely on the mere existence of official records. The facts with which respondent is charged were either in fact known to the prosecuting attorney, the investigating officers, or were contained in documents which the prosecutor had actually examined.

"By virtue of the same principles, the prosecution had reason to believe that Costello had not been attempting to 'straighten out.' Therefore, by asking Costello whether he had been so doing, the prosecutor knowingly attempted to create an impression in the minds of the jurors which he knew was false. For example, as discussed above, the prosecutor personally knew of the pending bak check charge against Costello. In addition, he had examined the witness' 'make sheet' which indicated, among other things, two offenses and a parole violation in the period of time involved, and the police officer (who had been present at the trial) knew of additional bad checks issued by Costello that were still outstanding.

"The final items of Costello's false testimony are the references to the witness' two alleged university degrees and his claimed annual income. This court has above described the facts known by the prosecutor about Costello. For a man with a history of felony convictions and state mental hospital commitments, such a success story is highly suspect, particularly when coupled with the known fact that Costello had been in

prison until November of 1953, and yet he claimed to have received his second degree, through night school, at a university in 1954. This rather incredible story was given in full to the jury as the result of leading questions by the prosecutor."

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It is thus established beyond peradventure that the prosecutor with full knowledge of the falsity of certain key prosecution testimony not only allowed it to stand when presented, but overtly led the chief prosecution witness in giving it after planning and discussing this testimony with him before he took the stand. During the trial (298 F. Supp. at 802) the defendant prosecutor Pachtman warded off police officers arriving in the courtroom to arrest the chief prosecution witness, Alfred Costello, for writing "bad checks" until he could place the witness Costello on the stand and lead him into his false and nefarious testimony. With knowledge that the chief witness had been in prison from 1951 through November of 1953, the prosecutor led that same chief witness Costello into the false story that the witness received a four-year degree in business from the University of California and in the genius-level time of two years, and had received, in addition, a degree in engineering at the University of Southern California in 1954, just a few months following his November 1953 discharge from California's San Quentin State Prison. (298 F. Supp. at 802, 803) The prosecutor failed to disclose or reveal the fact that the chief witness was in prison all this time, although defense cross examination sought knowledge of his commitments to various state institutions. Brady v. Maryland, 373 U.S. 83. It is a denial of due process to wilfully suppress evidence asked for under oath by the defense. The prosecutor had knowledge of this false evidence. 298 F. Supp. 795.

In short, we assert that when a prosecutor undertakes a prosecution for a state entity, he does not have the discretionary right to use knowing perjury to achieve the conviction, nor is such use of perjury within the scope of any purported judicial or quasi-judicial function. As such, the

prosecutor should be held liable under a 42 U.S.C. 1983 suit, where, as here, a Federal District Court has freed the prosecutor's victim precisely for that knowing use of perjury.

A recent significant Sixth Circuit opinion supports the denial of a cloak of immunity to a state prosecutor wilfully suppressing evidence tending to exonerate a female defendant being tried for murder. Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972), Cert. den. 409 U.S. 1029.

The Sixth Circuit posed as its duty the resolution of the questions (465 F.2d 1212, 1213):

> "To what extent does a prosecuting attorney have civil immunity in a suit filed by a defendant whom he has prosecuted in a criminal proceeding? This recurring question is presented on the present appeal."

Noting that the prosecutor in Hilliard v. Williams, supra, had wilfully suppressed a chemical laboratory report showing blood stains were in fact "hog blood" rather than "human blood," and where the identifications of said blood had played a critical role in the prosecution and conviction of the plaintiff Hilliard, as to the 42 U.S.C. 1983 lawsuit, the Sixth Circuit said: (465 F.2d at 1218)

> "We hold that the factual averments of the complaint (under 42 U.S.C. 1983) as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.' We are not willing to extend the doctrine of quasi-judicial immunity to a complaint

charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant." (465 F.2d 1212, 1218) (Sixth Circuit, 1972)

We note that this Honorable Court denied certiorari in Hilliard v. Williams, supra, 409 U.S. 1029, suggesting agreement of this Honorable Court with the proposition that a state prosecutor should not be cloathed with phony immunity for such an intentional act of wrongdoing.

Likewise, this Honorable Court denied certiorari and application for mandamus in Garrison v. Brown, 405 U.S. 985 (1972), involving an action for civil rights damages under 42 U.S.C. 1983 against District Attorney Jim Garrison of New Orleans for his prosecution of Clay Shaw on the charge of conspiring to assassinate President John F. Kennedy. See the note of this fact in Hilliard v. Williams, 465 F.2d 1212, 1217 (6th Cir. 1972). Previously, the Fifth Circuit had declined to dismiss the suit against Garrison on any so-called "prosecutorial immunity," and we can only believe that the denial of certiorari in the Fifth Circuit case of Garrison v. Brown, 405 U.S. 985, and the denial of certiorari in the Sixth Circuit case of Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) at 409 U.S. 1029 suggests that this Honorable Court is not willing to extend the doctrine of quasi-judicial immunity to errant District Attorneys who wilfully and intentionally deprive a criminal defendant of his civil rights.

Nonetheless, a fully briefed and argued case before this Honorable Court on the scope of immunity to be accorded to District Attorneys is now clearly mandated. This is said because (1) the issue to be resolved is of oft-recurring national scope, arising in several late cases; (2) there is

a severe conflict of results in the circuits; compare Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) with Imbler v. Pachtman, ____ F.2d ____(9th Cir. 1974), the case at bar; (3) the denial of certiorari in this case would create the anomalous and confusing result that this Honorable Court sanctioned both the refusal to dismiss cases (Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972), cert. den. 409 U.S. 1029, and Garrison v. Brown, cert. den. 405 U.S. 985), and the dismissal cases (Imbler v. Pachtman, ____ F.2d ____ , July, 1974), a result hardly in keeping with two of the functions of this Honorable Court:

(1) to resolve conflicts in the circuits, and

(2) to resolve severe national issues arising out of litigation in its supervisory role over the lower federal court system. See Mesarosh v. United States, 352 U.S. 1 (1956); Imbler v. Craven, 298 F. Supp. 795, 805 (C.D. Calif. 1969).

We pray that a writ of certiorari be granted to review that certain 2-1 decision in Imbler v. Pachtman, ____ F.2d _____ , (9th Cir. 1974), rehearing denied and suggestion for hearing en banc denied on September 10, 1974, because of (1) the significant and as yet unresolved issue presented, (see Holton v. Boman, 493 F.2d 1176, 1177, fn. 2 (7th Cir. 1974); and (2) because of the clear conflict of authority in the United States Courts of Appeals for the various circuits; compare Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) with Imbler v. Pachtman, _____ F.2d ____ (9th Cir. 1974), the instant case, herewith attached, but as yet unpublished.

II

THIS HONORABLE COURT, IN ITS SUPERVISORY ROLE OVER THE LOWER FEDERAL COUPT SYSTEM, SHOULD GRANT CERTIORARI TO RESOLVE A CURRENT SEVERE CONFLICT OF AUTHORITY IN THE VARIOUS UNITED STATES CIRCUIT COURTS OF APPEAL ON THE ISSUE OF SCOPE OF IMMUNITY TO BE ACCORDED DISTRICT ATTORNEYS UNDER 42 U.S.C. 1983 AND RELATED STATUTES OF THE FEDERAL CIVIL RIGHTS ACTS, AN ISSUE OF RECURRING NATURE, WHICH HAS NEVER BEEN RESOLVED BY THIS HONORABLE COURT.

It is well recognized that one of the prime precursors for this Honorable Court to grant certiorari in any federal matter emanating from the circuits is a clear conflict of results among the circuits. That clear conflict of results is clearly evident in the nationally important issue of scope of immunity to be accorded to District Attorneys who are made defendants in lawsuits filed under the Federal Civil Rights Acts, 42 U.S.C. 1983 and related sections.

We count several major opinions reaching essentially opposite results to that reached by the United States Court of Appeals for the Ninth Circuit in the case at bar, Imbler v. Pachtman, ____ F.2d ____ (9th Cir. 1974), and which preclude a dismissal of the case on the pleadings as was done in the case now at bar.

Really only one major opposite opinion is necessary to establish the asserted conflict, but there are others. A clear-cut opposite opinion is HIlliard v. Williams, 465 F.2d 1212 (6th Cir. 1972), a copy of which is herewith attached, cert. den. 409 U.S. 1029; the Hilliard v. Williams case was approved by the dissent in the instant 2-1 decision affirming the dismissal, Circuit Judge John F. Kilkenny dissenting.

Further, it would appear that the Fifth Circuit does

not approve of the dismissal on the pleadings, Garrison v. Brown, cert. den., 405 U.S. 985 (1972); Hilliard v. Williams, 465 U.S. 1212, 1217 so noting.

An earlier Fifth Circuit case also established that the Fifth Circuit did not sanction the dismissal against a Deputy District Attorney who acts "without authorization of law" in depriving a person of civil rights. In Lewis v. Brautigam, 227 F.2d 124, 129 (5th Cir. 1955), the Court said:

> "A quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, can not shelter himself from liability by the plea that he is acting under color of office."

It is clear that the knowing use of perjured testimony is without authorization of law, and is illegal, and deprives a criminal defendant of due process of law, and can not be an act for which a District Attorney is ever authorized to engage. Mooney v. Holohan, 284 U.S. 103; Giles v. Maryland, 386 U.S. 66; Napue v. Illinois, 360 U.S. 264; Alcorta v. Texas, 355 U.S. 24; Hysler v. Florida, 315 U.S. 411; Pyle v. Kansas, 317 U.S. 213; Miller v. Pate, 387 U.S. 1; see also Mesarosh v. United States, 352 U.S. 1 (1956); see Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969) and the cases cited. See late decisions of this Court, Giglio v. United States, 405 U.S. 150, and DeMarco v. United States, ____ U.S. ____, 39 L.Ed.2d 501 (1974) in full accord. The knowing use of perjury by a prosecuting attorney is "without authorization of law" nationally, and would support a 42 U.S.C. 1983 cause of action in the Fifth Circuit.

Moreover, the Fourth Circuit provides immunity if and only if the act assailed is a discretional act done in good faith, where the District Attorney can exercise a legitimate

right to either do the act or not do the act.

In McCray v. Maryland, 456 F.2d 1, 3 (4th Cir. 1972), the Court said:

> "The immunity of quasi-judicial officers such as prosecuting attorneys and parole board members derives, not from their formal association with the judicial process, but from the fact that they exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role in the judicial system."

It is clear that the decision to use or not use perjured testimony in a criminal prosecution is not an act of discretion, for it is absolutely forbidden, and is moreover a denial of due process of law to its victim. Mooney v. Holohan, 284 U.S. 103; Giles v. Maryland, 386 U.S. 66; Napue v. Illinois, 360 U.S. 264; Alcorta v. Texas, 355 U.S. 24; Hysler v. Florida, 315 U.S. 411; Pyle v. Kansas, 317 U.S. 213; Miller v. Pate, 387 U.S. 1; United States v. Giglio, 405 U.S. 150; DeMarco v. United States, ——— U.S. ——— , 39 L.Ed.2d 501 (1974). See also Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969) and the cases cited.

We conclude, therefore, that the Fourth Circuit would allow the maintenance of a 42 U.S.C. 1983 lawsuit against a District Attorney under the allegations of the complaint dismissed herein by the District Court and said dismissal

being affirmed by the Ninth Circuit.

We further suggest that late decisions in the Seventh Circuit provide a cause of action against a prosecutor, denying the dismissal on the pleadings. Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973); Holton v. Boman, 493 F.2d 1176 (7th Cir. 1974).

The trial level courts of the United States Court of Appeals for the Eighth Circuit allows the maintenance of the cause of action against the District Attorney. Haaf v. Grams, 355 F. Supp. 542 (D.C. D. Minn. 1973), where the District Court held, at 545:

> "...Plaintiffs allege here that defendant Ahles withheld exculpatory evidence. It has been specifically held that a prosecutor who withholds evidence is liable under Section 1983 when the criminal charges are eventually determined in favor of the one charged. Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) It therefore appears that plaintiff Janette Haaf has alleged sufficient facts which, if proved, would result in liability. Such questions of fact may not be determined on motion..."

We thus assert that the Fourth Circuit, McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972), the Fifth Circuit, Lewis v. Brautigam, 227 F.2d 124 (5th Cir. 1955) and Garrison v. Brown, cert. den. 405 U.S. 985, the Sixth Circuit, Hilliard v. Williams, 465 U.S. 1212 (6th Cir. 1972), the Seventh Circuit, Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973) and Holton v. Boman, 493 F.2d 1176 (7th Cir. 1974), and the Eighth Circuit trial courts in adopting Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972), see Haaf f. Grams, 355 F. Supp. 542, 545 (D.C.D. Minn. 1973), all provide contrary

authority to the instant Ninth Circuit opinion in Imbler v. Pachtman, ____ F.2d ____ (1974), and this clear conflict of authority should cause the grant of certiorari to resolve the disparity and establish a single national authority.

We urge that this Court grant certiorari to resolve this severe national issue arising time after time in 42 U.S.C. 1983 litigation. We are of the opinion, as is dissenting Circuit Judge Kilkenny in the case at bar, that the "shield of immunity" should (not) rest on the brow of a District Attorney who knowingly, wilfully and maliciously utilizes perjured testimony to obtain a conviction. This conduct should not be condoned as an integral part of the judicial process." (Emphasis that of the court.) (Page 8, opinion, Imbler v. Pachtman, ____ F.2d ____ (9th Cir. 1974), herewith attached.)

We pray that certiorari issue to review this decision and resolve the conflicts in the circuits.

III

IN VIEW OF THIS HONORABLE COURT'S OPINION IN SCHEUER V. RHODES, _____ U.S.____ , ____S.Ct.____ , _____ L.Ed.2d____ , 42 U.S.L.W. 4543 , April 17, 1974, DENYING IMMUNITY TO EXECUTIVE OFFICERS OF A STATE UNDER A 42 U.S.C. 1983 LAWSUIT, THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER A PROSECUTOR IS NOT MORE PROPERLY AN ARM OF THE EXECUTIVE BRANCH OF GOVERNMENT AND THEREFORE WHETHER HIS IMMUNITY, IF ANY, TO SUIT UNDER 42 U.S.C. 1983 IS NOT MORE PROPERLY TO BE MEASURED BY ASSERTED "EXECUTIVE IMMUNITY" RATHER THAN "QUASI-JUDICIAL" IMMUNITY.

We here suggest that the oft-quoted "quasi-judicial" immunity "enjoyed" by prosecutors is misplaced and misquoted,

for they are truly branches of the executive arm of the government. In the federal domain, all United States attorneys are under the justice department, which is in turn under the jurisdiction of the Attorney General of the United States, a cabinet level post directly appointed by the President. A prosecutor of course stands on no different level than his opposing defense attorney, both of them supposedly urging in an adversary manner their contentions on a neutral trial judge, himself a member of a totally different branch of government, the judicial.

To assert that one party to the adversary trial, the prosecutor, derives "immunity" because he is "quasi-judicial" confounds the logic of the rational thought processes. As certiorari should be granted in the case at bar because of (1) the profound and recurring national question presented and (2) because of a conflict in the circuits, we suggest that this Honorable Court direct attention to and certify as a question for resolution the foregoing rather bona fide inquiry into the classification of the country's prosecutors in a "quasi-judicial" role so as to accord to them some pseudo-immunity.

Indeed, the duties and obligations of prosecutors are different from and stand on a higher level than a defense attorney, inasmuch as they represent "all of the people," even the defendant to whom they must disclose helpful evidence under their control.

The Sixth Circuit noted this duty of the prosecutors in Hilliard v. Williams, 465 F.2d 1212,1217 (6th Cir. 1972), thusly:

> "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This

special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused.

"DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.

"(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

"(B) A public prosecutor or other government lawyer in criminal litigation shall make timely

disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

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Dissenting Judge John F. Kilkenny adopted many of these regulations and restrictions in his dissent in the 2-1 opinion under review, Imbler v. Pachtman, ____ F.2d ____ (9th Cir. 1974).

We suggest the foregoing executive-judicial resolution as an alternate and concomitant ground for grant of certiorari.

Conclusions

For each of the foregoing reasons, (1) the resolution of a de novo issue of national importance, (2) the resolution of a clear-cut and severe conflict in the circuits, and (3) the clarification of the role of the prosecutor as "executive" rather than "quasi-judicial," in 42 U.S.C. 1983 litigation, we pray that certiorari issue to review that certain 2-1 decision in Imbler v. Pachtman, ____ F.2d ____ (9th Cir. 1974).

Dated: October 5, 1974

Respectfully submitted,

Roger S. Hanson
Attorney for Paul Kern Imbler
Member of the Bar
United States Supreme Court
U.S. Court of Appeals, 9th Circuit

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL KERN IMBLER, *Plaintiff-Appellant*,

vs.

RICHARD PACHTMAN, DE WITT LIGHTNER, SANFORD MCCALEB, DONAL H. SEARS, KENNETH SCARCE, and ECTOR A. GARCIA, *Defendants-Appellees.*

No. 72-2518

OPINION

[July 12, 1974]

Appeal from the United States District Court for the Central District of California

Before: KOELSCH, HUFSTEDLER and KILKENNY, Circuit Judges.

KOELSCH, Circuit Judge:

This matter has a long history. In 1961 plaintiff-appellant Imbler was convicted on a murder charge in Los Angeles Superior Court and sentenced to death. The California Supreme Court affirmed. *People v. Imbler*, 57 Cal. 2d 711 (1962). Thereafter, Imbler's state habeas corpus petition was denied following an evidentiary hearing. *In re Imbler*, 60 Cal. 2d 554 (1963). A subsequent writ set aside the death penalty, *In re Imbler*, 61 Cal. 2d 556 (1964); and when the state declined to prosecute another "penalty trial," Imbler was given a life sentence.

In 1969 the United States District Court, concluding that Imbler's conviction was secured in part by testimony the prosecution knew, or had strong reason to know, was perjured, granted him a writ of habeas corpus. *Imbler v. Craven*, 298 F. Supp. 795, 809 (1969). We affirmed, *Imbler v. Craven*, 424 F.2d 631 (9th Cir. 1970), *cert. denied*, 400 U.S. 865.

Imbler then brought this suit for damages. So far as need be noticed, his allegations in substance are that the defendant

Pachtman, the district attorney who prosecuted the criminal charges on behalf of the State of California, had knowingly, maliciously, etc., used perjured testimony to secure a conviction and hence was liable in damages for violation of his, Imbler's, civil rights. The district judge dismissed Imbler's complaint as to Pachtman without leave to amend; he ruled that Pachtman, as a prosecuting attorney, enjoyed an immunity from suit for acts committed "in the performance of duties constituting an integral part of the judicial process . . .", *Marlowe v. Coakley*, 404 F.2d 71 (9th Cir. 1968); *see Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965); and that as a matter of law the acts complained of came within a quasi-judicial prosecutorial function to which immunity attached. Imbler appeals.[1] We affirm.

The district court's dismissal of appellant's claim was consistent with our prior decisions. *Ney v. State of California*, 439 F.2d 1285 (9th Cir. 1971); *Donovan v. Reinbold*, 433 F.2d 738, 743 (9th Cir. 1970); *Marlowe v. Coakley, supra; Clark v. Washington*, 366 F.2d 678 (9th Cir. 1966); *Robichaud v. Ronan, supra; Agnew v. Moody*, 330 F.2d 868 (9th Cir. 1964); *Harmon v. Superior Court*, 329 F.2d 154 (9th Cir. 1964); *Sires v. Cole*, 320 F.2d 877 (9th Cir. 1963). The acts of the defendant which allegedly harmed appellant occurred during prosecutorial activities which can only be characterized as an "integral part of the judicial process."[2] All involved the questioning of a witness dur-

[1]As appears from the caption, there are several defendants. In ruling against Imbler the court directed entry of judgment immediately, R. 54 (b), F. R. Civ. P. The appeal from the ensuing limited judgment is thus valid.

[2]The dissent argues that deliberate suppression of evidence or subornation of perjured testimony is unprotected by quasi-judicial immunity because such acts, being improper exercises of prosecutorial power, are not an integral part of the judicial process; the dissent therefore concludes that our prior cases do not confer immunity when the complaint charges knowing and malicious abuse of prosecutorial power. The purported distinction undermines the purpose of the absolute immunity previously recognized, because the additioin of an easy to make but difficult to prove charge of knowing and malicious prosecutorial misconduct to any complaint would suffice to require a full trial on the merits of the prosecutor's conduct while acting as a judicial officer.

More importantly, the distinction is clearly inconsistent with our prior cases. In *Robichaud v. Ronan, supra*, the court indicated that a prosecutor's immunity is absolute when engaged in quasi-judicial activities,

ing the 1961 criminal prosecution.[3]

Appellant, in effect, urges us to reject the doctrine of prosecutorial immunity and overrule a long line of this court's decisions. We decline to do so. The protection given a prosecutor acting in his quasi-judicial role protects not simply the prosecutor, but, more importantly, the effective operation of the judicial process, and hence the "common good." Because both the honest and dishonest are insulated, on occasion an injury without redress inevitably results; but, as well expressed by Judge Learned Hand:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with

noting that no suit for malicious prosecution could be brought regardless of the existence of malice or even willfulness on the part of the prosecuting attorney. *See* 351 F.2d at 536. Equally in point is *Marlowe v. Coakley, supra:* the dissent's "monumental distinction" of *Marlowe* is spurious. The complaint there alleged that the prosecuting attorney knowingly and willfully, or with gross negligence, presented perjured testimony to the grand jury investigating plaintiff's activities and that he suppressed from the grand jury exculpating evidence within his knowledge, again willfully and deliberately. In ruling on the district court's dismissal under Rule 12b(6), the court necessarily had to evaluate the claim assuming that the charges of willful perjury and suppression were true. Notwithstanding these allegations, the court held that the district attorney, in presenting evidence to the grand jury, was acting within the scope of his duty to advise and present information to the grand jury, and that this function is an integral part of the judicial process. In short, the dissent's approach to prosecutorial immunity has been rejected in this circuit.

[3]Appellant contends the defendant engaged in non-immune police activity when he asked two police officers, seeking, during a recess in the trial, to discuss a criminal charge with the prosecution's chief witness, to wait until the end of the witness's testimony. We reject the contention. A prosecutor's request for an opportunity to complete an examination during a trial is a quasi-judicial act within the purposes of the immunity. More critically, the request to the police did not in itself deprive appellant of any civil right. Even if the defendant had then been acting in a police role, only the subsequent inducement of the testimony that the witness was trying to "straighten out," when the prosecutor had good reason to know the witness was in trouble, made the request to the officers legally relevant to appellant's civil rights; the questioning of a witness at trial is within a traditional prosecutorial function.

> the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The jurisdiction for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

As indicated earlier, the issue is not "*res nova*" in this circuit.[4] The "balance between the evils inevitable in either alternative"

[4]The dissent's reliance on the Supreme Court's latest pronouncement on the subject of immunity, *Scheuer v. Rhodes*, ... U.S. ....., 42 U.S.L.W. 4543 (April 17, 1974), holding that state executive officials are not absolutely immune from suit, is misplaced. If anything, *Scheuer* tends to support our conclusion. The Court there recognized (*Scheuer* at 4545 n.4; *see Pierson v. Ray*, 386 U.S. 547, 553-55 (1967)) that the immunity of executive officers has historically "been of a more limited nature" than that of judicial officers—undoubtedly because the threat of private liability as a sanction for abuse of power is less necessary in the judicial system, which provides institutionalized systems of review to correct errors. Prosecutorial immunity is not a form of executive immunity, but rather a form of judicial immunity, *Robichaud v. Ronan, supra*, at 536, designed to protect the judicial process; it attaches only to prosecutorial acts "constituting an integral part of the judicial process."

has consistently been struck in favor of protecting honest criminal prosecution, at the expense of those injured by scoundrels,[5] by granting immunity from suit to all prosecutors.[6]

The judgment is affirmed.

KILKENNY, Dissenting:

Although appellant's 22 page amended complaint, with 23 pages of exhibits, is admittedly repetitious and in places ambiguous, there is no question but that it charges appellee, Pachtman, with knowingly, wilfully and maliciously using eight different items of false material testimony in securing appellant's initial conviction. If this is true, I believe that appellee violated appellant's procedural due process rights, and that he should be stripped of his official or representative character and subjected in his person to the consequences of his individual conduct.

The Supreme Court decision in *Scheuer, Adm'x. v. Rhodes*, ... U.S. ....., 42 U.S.L.W. 4543 (April 17, 1974), the most recent expression of the Court on the overall subject, convinces me that, on these charges, the appellee does not have quasi-judicial, or any other, immunity. True enough, *Scheuer* involved state executive, rather than judicial, immunity. However, the Court in *Scheuer*, analyzed the long history behind executive, as well as judicial immunity, and noted that there was

[5]The reference is general and not intended as personal.

[6]Appellant contends, in substance, that the district court's determination in the habeas proceeding established defendant's violation and therefore assures that an "innocent" prosecutor is not being made to face a trial and potential liability. Wholly aside from the fact that the California Supreme Court, on precisely the same facts available to the district court (the district court did not hold an evidentiary hearing and relied on the factual findings of the referee in the California Supreme Court's habeas proceeding), found there was no evidence that the prosecutor knowingly used perjured testimony, *In re Imbler, supra*, at 565, those determinations are not *res judicata* as to the defendant: he was not a party to the habeas proceeding. Here, as in any other §1983 suit against a prosecutor, a determination of the claim would require a full trial. The burden and risk of that trial is precisely what the immunity is designed to prevent. If one prosecutor must face the risk of liability because of an ill-grounded exception to absolute immunity, then all potentially may, and the public purpose of the immunity is lost.

a ". . . similarity in the controlling policy considerations in the case of high echelon executive officers and judges . . ." (42 U.S.L.W. at 4547, n. 8); the policy considerations revolving, in large measure, around the continued assurance that public officials will continue to vigorously perform their public functions without threat of harassment by civil suit. All this being said, the Supreme Court went on to hold that high executive officers do not have an unqualified immunity from civil suit. The Court emphasized:

> "Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer has 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.' *Sterling v. Constantin*, 287 U.S. 378, 397 (1932)." 42 U.S. L.W. at 4548.

If, as held in *Scheuer*, the highest executive officer of a great state is not clothed with absolute immunity and, assuming that the policy considerations behind executive immunity are similar to those behind judicial immunity, then it must necessarily follow that a prosecuting attorney, shielded only by a form of judicial immunity (*Robichaud v. Ronan*, 351 F.2d 533 (CA 9 1965)), should not be elevated to a status which would place him above the chief executive officer of his state. Otherwise, the office of the district attorney, rather than the Constitution of the United States, becomes the Supreme Law of the Land. Of course, under our system of government, such a conclusion is clearly untenable. State officials in these circumstances should not escape the paramount authority of the Federal Constitution. I quote from *Sterling v. Constantin*, 287 U.S. 378, 398 (1932):

> "When there is a substantial showing that the exertion of state power has overridden private rights secured by [the] Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

Aside from my view that *Scheuer* is controlling, the cases cited by the majority, in my opinion, are clearly distinguishable.

For example, in *Ney v. State of California*, 439 F.2d 1285 (CA9 1971), the appellant charged the district attorney, or his deputy, with knowingly using altered tapes. The facts revealed, however, that the district attorney's deputy actually used the tapes and, therefore, if the district attorney could be sued at all, he would be liable only on a theory of *respondeat superior*. In *Ney*, this court stressed that the allegation of fact supporting the purported misconduct was based on ". . . much conclusionary language . . . ." 439 F.2d at 1287. In the instant case, the factual allegations charge the district attorney with engaging in specific instances of misconduct wholly reprehensible to the integrity of the judicial process.

Donovan v. Reinbold, 433 F.2d 738 (CA9 1970), is no more enlightening. There, the action was against two city police officers and two city attorneys. This court held that the doctrine of immunity from civil suit under § 1983 would not bar an action against them. Nothing in *Donovan* even remotely indicates that a civil rights action should not lie on our facts. For that matter, the opinion recognizes that:

> "[t]he purpose of according judicial immunity is to protect the integrity of the judicial process. It is not to shield lawyers *or judges* from liability for the invasion of another's federally secured constitutional rights, when the alleged invasion did not occur during the performance of acts that are an integral part of the judicial process." 433 F.2d at 743. [Emphasis supplied]

To now hold, on our facts, that the knowing, wilful and malicious use of perjured testimony to gain a conviction, even though accomplished during the course of a trial, constitutes an integral part of the judicial process, flies in the very face of the integrity sought to be protected by judicial and quasi-judicial immunity.

The allegations in *Marlowe v. Coakley*, 404 F.2d 70 (CA9 1968) charged the prosecuting attorney with ". . . knowingly and wilfully, *or with gross negligence*, present[ing] perjured testimony to the grand jury . . . ." [Emphasis supplied] Needless to say, there is a monumental distinction between charging an officer with gross negligence in connection with the presenta-

tion of perjured testimony and charging him with knowingly, wilfully and maliciously *using* perjured testimony to obtain a conviction. Consequently, the decision of the *Marlowe* court could well rest on the failure of the complainant to clearly charge wilful misconduct in presenting the perjured testimony. *Cf. Ney v. State of California, supra* at 1287. The alternative does not equate with wilful action. I decline to hold that the shield of immunity should rest on the brow of a district attorney who *knowingly, wilfully and maliciously* utilizes perjured testimony to obtain a conviction. This conduct should not be condoned as an *integral part of the judicial process*.

Clark v. State of Washington, 366 F.2d 678 (CA9 1966), recognizes the rule that a prosecuting attorney enjoys immunity under the Civil Rights Act only insofar as his prosecuting functions are concerned. At the risk of being repetitive, I again stress that appellee's acts, as charged in the amended complaint, had nothing to do with his *legitimate* prosecutory functions.

In *Agnew v. Moody*, 330 F.2d 868 (CA9 1964), *cert. denied* 379 U.S. 867, the court there sidestepped the contention that the doctrine of official immunity did not apply where the wrongful act was *of an extraordinary character*, as that phrase was used in *Tenney v. Brandhove*, 341 U.S. 367, 378-79 (1951), by saying, "[i]f such an indefinite exception to the immunity rule exists, we are satisfied that appellant's case does not fall within it." 330 F.2d at 869. *Scheuer, supra*, makes it clear that the doctrine of official immunity does not apply in cases where the wrongful act is of an extraordinary character.

Hilliard v. Williams, 465 F.2d 1212 (CA6 1972), *cert. denied* 409 U.S. 1029, is closely in point. There, the court, in a civil rights action, recognized the general rule that a prosecuting attorney, when acting in his official capacity, is immune from a suit for damages. The court then goes on to hold that 'the doctrine of quasi-judicial immunity, normally shielding a prosecuting attorney, should not be extended to the situation where a complaint charges that the officer deliberately suppressed material evidence which resulted in the conviction of the appellant. The court emphasized that such wilful conduct was ". . . outside [the officer's] quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.'" 465 F.2d at 1218.

On the charges before us, I would hold that appellee acted entirely outside the scope of his jurisdiction and should not be permitted to shelter himself from liability by a plea that he was acting under the immunity of his office. Not to be forgotten is the high responsibility accepted by a prosecuting officer when he enters upon the duties of his office. For example: (1) he is required to recognize that in our system of justice, the accused is to be given the benefit of all reasonable doubt; (2) his decisions during the course of the prosecution must be fair to all, including the defendant; (3) he has a duty of timely disclosure to the defense of all available evidence known to him that tends to help the defendant, and (4) it is his duty to seek justice, not pervert it, by placing a conviction above the constitutional rights of the accused. It is time to recognize that prosecutors are not entirely above the law which holds other individuals financially accountable for their *intentional misdeeds*.

Needless to say, I express no opinion as to the merits of appellant's claims. I only say that on the basis of the allegations in the amended complaint, he is entitled to have a full-fledged judicial inquiry.

I WOULD REVERSE.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL KERN IMBLER, Plaintiff-Appellant, vs. RICHARD PACHTMAN, DE WITT LIGHTNER, SANFORD McCALEB, DONAL H. SEARS, KENNETH SCARCE, and ECTOR A. GARCIA, Defendants-Appellees.	)	NO. 72-2518

(Cc-71-123RJK)

Before: KOELSCH, HUFSTEDLER and KILKENNY, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING IN BANC

Judges Koelsch and Hufstedler voted to deny the petition for panel rehearing and to recommend against a rehearing in banc. Judge Kilkenny voted to grant the panel rehearing and recommended that the in banc rehearing be granted.

The full court having been duly advised and no judge of the court in active service having requested a vote on the suggestion for rehearing in banc, the petition for rehearing is denied, and the suggestion for rehearing in banc is rejected.

Prosecutor Cleared in Damage Suit

A prosecutor who helped send Paul Kern Imbler to prison on a holdup-murder conviction—which a federal judge later ruled was unfairly obtained with false evidence—has been dismissed as a defendant in a $2.7 million civil rights damage suit filed by Imbler.

The U. S. 9th Circuit Court of Appeals said Richard E. Pachtman, a Los Angeles deputy district attorney, was immune from suit for acts committed in the performance of duties constituting an integral part of the judicial process.

Imbler twice faced execution and served nearly 10 years in prison before being freed in 1971 by U. S. Dist. Judge Warren J. Ferguson.

His damage suit also named as defendants a number of other state, county and city officials involved in his arrest, prosecution or incarceration.

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LOS ANGELES TIMES, CIRCA July 15, 1974

branches, shall not be sold for less than double the minimum price of the public lands when sold.

Sec. 4. And be it further enacted, That the said lands hereby granted to the said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid and no other; and the said railroad and branches shall be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

Sec. 5. And be it further enacted, That if the said railroad shall not be completed within ten years, the said State of Illinois shall be bound to pay to the United States the amount which may be received upon the sale of any part of said lands by said State, the title to the purchasers under said State remaining valid; and the title to the residue of said lands shall reinvest in the United States, to have and hold the same in the same manner as if this act had not been passed.

Sec. 6. And be it further enacted, That the United States mail shall at all times be transported on the said railroad under the direction of the Post-Office Department, at such price as the Congress may by law direct.

Sec. 7. And be it further enacted, That in order to aid in the continuation of said Central Railroad from the mouth of the Ohio River to the city of Mobile, all the rights, privileges, and liabilities hereinbefore conferred on the State of Illinois shall be granted to the States of Alabama and Mississippi respectively, for the purpose of aiding in the construction of a railroad from said city of Mobile to a point near the mouth of the Ohio River, and that public lands of the United States, to the same extent in proportion to the length of the road, on the same terms, limitations, and restrictions in every respect, shall be, and is hereby, granted to said State of Alabama and Mississippi respectively.

Approved, September 20, 1850.

Lilly Mae Onie Lee Whitelaw HILLIARD, Plaintiff-Appellant,

v.

John L. WILLIAMS, Defendant-Appellee.

No. 71-1983.

United States Court of Appeals, Sixth Circuit.

June 28, 1972.

As Amended July 31, 1972.

Damages action brought under the Civil Rights Act against district Attorney General who had prosecuted plaintiff in a criminal proceeding. The United States District Court for the Western District of Tennessee, Eastern Division, Harry W. Wellford, J., sustained a motion to dismiss for failure to state a claim upon which relief could be granted, and plaintiff appealed. The Court of Appeals, Harry Phillips, Chief Judge, held that doctrine of quasi-judicial immunity for a prosecuting attorney would not be extended to a complaint charging that district Attorney General deliberately suppressed at first murder trial of plaintiff, whose initial conviction was reversed and who was then acquitted at second trial, an FBI report establishing the innocence of plaintiff.

Reversed and remanded.

1. Courts ⇐100.3(4)

On appeal from dismissal of a civil rights action, averments of complaint must be treated as true by Court of Appeals and are to be viewed in light most favorable to complainant.

2. Federal Civil Procedure ⇐1773

Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief.

3. District and Prosecuting Attorneys ⇐10

A prosecuting attorney, when acting in his official capacity, is immune from suit for damages, provided his acts are within the scope of his jurisdiction and authorized by law.

4. District and Prosecuting Attorneys ⇐10

A quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law cannot shelter himself from liability by the plea that he is acting under color of office.

5. District and Prosecuting Attorneys ⇐10

Doctrine of quasi-judicial immunity for a prosecuting attorney would not be extended to a complaint charging that district Attorney General deliberately suppressed at first murder trial of plaintiff, whose initial conviction was reversed and who was then acquitted at second trial, an FBI report establishing the innocence of plaintiff. 28 U.S.C.A. §§ 1292(b), 1343(3); 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc. rule 12(b)(6), 28 U.S.C.A.

Dwayne D. Maddox Huntington, Tenn., Julian P. Guinn, Paris, Tenn., on brief, for plaintiff-appellant.

Bart Durham, Asst. Atty. Gen., David M. Pack, Atty. Gen., Nashville, Tenn., on brief for defendant-appellee.

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and McALLISTER, Senior Circuit Judge.

PHILLIPS, Chief Judge.

To what extent does a prosecuting attorney have civil immunity in a suit filed by a defendant whom he has prosecuted in a criminal proceeding? This recurring question is presented on the present appeal.

The defendant-appellee is the District Attorney General for the Twenty-sixth Judicial District of Tennessee. He was prosecuting attorney at a trial resulting in the conviction of plaintiff-appellant Hilliard for second degree murder. This conviction was reversed by the Tennessee Court of Criminal Appeals on April 15, 1971. At the second trial Mrs. Hilliard was acquitted. In the meantime she had served one year in prison.

The evidence upon which Mrs. Hilliard was convicted at her first trial was entirely circumstantial. A key issue was whether stains on the nylon jacket worn by her at the time of her arrest were blood stains, and if so, whether the stains were from human blood as contended by the prosecution or hog blood as contended by the defense.

In reversing the conviction, the Tennessee Court of Criminal Appeals said:

"Of quite devastating impact tending to show guilt was the fact that the defendant had what appeared to be blood stains on her jacket. The State introduced proof of this, and then it was revealed that the jacket itself had been sent to the F.B.I. laboratory in Washington D. C. for chemical analysis and, although some three months had passed since the jacket had been taken from the defendant, it had not been returned for use at the trial; nor was there any information available to shed light on the vital issue of whether the blood was human as theorized by the State or hog as theorized by Mrs. Hilliard.

"Although, as aforesaid, no opportunity was allowed the trial court to correct any error that might have been involved in allowing the State's proof concerning the blood being on the jacket when it developed that the jacket itself was, by State action, unavailable, and thus we cannot consider the propriety of the court's rulings on the objections made during trial; the impact of this testimony does enter into our decision. The proof offered by the State relative to this blood was circumstantial as was all the other. But here there was an opportunity to make available to the jury direct

proof, in the face of the defendant's testimony that the blood was that of a hog, that would have supported one theory and discredited the other. Either the blood was human or swine. It is had been established as human, this would have left little room for doubt that the defendant was not telling the truth in her explanation of how she got blood on her clothing. If it developed that the blood was from a hog, this would have proved conclusively that she was telling the truth, in this particular at least.

"Certainly the two hypotheses suggested by the proof of blood on the jacket—one tending strongly to suggest guilt, the other tending to support the theory of the defendant—are equally reasonable. In its present condition the evidence offered by the defendant buttressed by the presumption of innocence never overcome by sufficient proof preponderates against the verdict."

Following her acquittal at the second trial, Mrs. Hilliard filed the present civil action for damages against the District Attorney General. Jurisdiction is asserted both on the ground of diversity of citizenship and under the civil rights act, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).[1]

The District Attorney General filed a motion to dismiss pursuant to Rule 12(b) (6), Fed.R.Civ.P. for failure to state a claim on which relief can be granted. The District Court sustained this motion, holding that the District Attorney General is immune from civil liability. We reverse, holding that the District Court erred in ruling that the complaint does not state a claim on which relief can be granted.

This is an interlocutory appeal under 28 U.S.C. § 1292(b). The District Court certified that the order of dismissal involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. The District Court also directed the entry of final judgment as to the District Attorney General, making an express determination that there is no just reason for delay. Rule 54(b), Fed.R.Civ.P. This court granted leave to appeal.

[1, 2] Our reversal is based entirely upon the factual averments of the complaint, which are summarized hereinafter in this opinion. These averments must be treated as true for purposes of this appeal and are viewed in the light most favorable to Mrs. Hilliard. Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972), L'Orange v. Medical Protective Society, 394 F.2d 57, 59 (6th Cir. 1968). "In appraising the sufficiency of this complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

The complaint avers that Mrs. Hilliard is a citizen of Indiana; on or about December 24, 1969, she arrived in Carroll County, Tennessee, to visit her maternal aunt, Vina Prince, and the aunt's husband, Ernie Prince; the purpose of her visit was to assert and settle her claim to a one-half interest in certain real estate inherited from her grandmother; Ernie Prince had operated the land for many years and had claimed ownership from time to time; on February 19, 1970, Ernie Prince was killed and Mrs. Hilliard was arrested and charged with his murder.

The complaint further states that at the time of her arrest Mrs. Hilliard was wearing a blue nylon jacket which the officers claimed was stained with the blood of Ernie Prince; the victim was murdered by two vicious axe blows to the skull, and the body thereafter was dragged to the rear of the house and shot in the mouth with a shot gun. Mrs. Hilliard asserted that when she was arrested there was no blood on her jacket, but if there were any such stains it was hog blood from preparing raw meat.

The complaint asserts that circumstantial evidence pointed the finger of guilt to Vina Prince, who is insane. The opinion of the State Court of Criminal Appeals pointed out that Mrs. Prince was not available as a witness, due to her mental condition. The court commented:

"It is regrettable that she was not available as a witness . . . Since there is no doubt that this woman was present before, during, and after the assault of the deceased, her potential as a witness is quite evident. She could have witnessed the crime or have committed the crime herself."

It is averred that the only probative material evidence against Mrs. Hilliard was the allegedly blood stained jacket and some allegedly blood stained curtains; that the jacket and curtains were sent to the FBI laboratory in Washington, D. C., for analysis; that the FBI report was negative as to human blood, or any blood, being on either the jacket or the curtains; that the District Attorney General saw the FBI report well in advance of the trial and was familiar with its contents; that neither the FBI report nor the jacket and curtains were made available to be introduced in evidence at the trial; that the contents of the FBI report were never divulged to Mrs. Hilliard or her attorney; instead, it was claimed by the prosecution that the jacket and curtains had been resubmitted to the FBI on April 28, 1970, at a time when the trial already had been set for May 15, 1970, too late for them to be returned in time for introduction in evidence; that the District Attorney General produced evidence before the jury to the effect that the spots on the jacket and curtains "looked like" or "appeared to be" blood stains, in spite of the FBI report that there were no blood stains; that the District Attorney General suppressed and concealed the positive proof that there was no blood on either the jacket or curtains; and that if the FBI report had been introduced into evidence, Mrs. Hilliard would have been acquitted at her first trial as she was at the second.

The complaint further contains these averments:

"22. That in the preparation of the case, the Defendant Williams advised or suggested or implied by some means that the witness Defendant Clark and perhaps others, should not mention anything about the first report of March 28, 1970, and that the Defendant Clark and other witnesses followed his instructions and answered both direct examination questions and cross-examination questions evasively, deliberately misleadingly, with half truths and in instances falsely, to carry out the complete suppression of the report of negative blood analysis of the items.

"23. That the Defendant Williams to carry out his intention of concealing and suppressing the report, contrary to any interpretation of good practice, and knowing that the defense expected the production of the jacket and report of the examination thereof for human blood, the Complainant insisting that there was no blood or if blood then animal blood, not human, announced that the State was ready for trial well knowing he was not going to offer the jacket or curtains or the report, and that once the trial had commenced, the Complainant's defense counsel could not obtain the jacket or any report in time to use it for defense evidence in the trial, and thus suppressing and concealing the evidence which would acquit the Complainant.

"24. That the Defendant Williams when the Complainant's defense counsel demanded the production of the

1. The other defendant is the Resident Agent of the Tennessee Bureau of Investigation, who filed an answer in the District Court. He is not a party on this appeal.

jacket, or a continuance until it could be produced, knowingly and deliberately advised the Court that through no fault of the State or prosecutors the jacket was not immediately available, as a witness had testified, when he knew or should have known by diligent inquiry that the same was in the T.B.I. office in Nashville, and would have required only two and one-half ($2\frac{1}{2}$) hours to be available, and he well knew that the jacket was deliberately sent off on such a late date that its return by trial date was impossible, and he knew of the materiality of the jacket and report and should have announced its unavailability before commencement of the trial, and by these actions suppressed and concealed the evidence of the jacket and report favorable to the Complainant.

"25. That the Defendant Williams knowingly procured and allowed witnesses such as the Defendant Donn Clark and perhaps others to mislead and deceive the Jury, Court, and criminal Defendant and her counsel, when he was aware of stronger evidence than that elicited from his witnesses, which was favorable to the criminal defendant, and failed and refused to reveal the favorable evidence and allowed the evidence he knew to be false to form the basis of the Complainant's conviction of murder in the second degree.

"26. That both Defendants continued to suppress and conceal the report from the complainant's defense counsel, after the trial was concluded, knowing that the same would constitute a basis for a new trial for the Complainant and only disclosed the report when compelled by the opinion of the Court of Criminal Appeals which required that they do so, then revealing the same for the first time the 20th day of April, 1971.

"27. That the Defendants and each of them, by the suppression and concealment, and by trickery, deceit, fraud, unethical practices and conduct for a public official, contrary to their oath of office and in violation of the Defendant's right to a fair trial and due process, were the direct and proximate cause of the Complainant being illegally and unlawfully confined in either the Carroll County Jail or the State Women's Prison in Nashville, and wrongfully deprived of her liberty and freedom, and further the direct and proximate cause of unbelievable mental pain and anguish as a result of being unlawfully and wrongfully imprisoned and branded forever as a convicted murderess, suffered day and night behind prison bars and of her earnings during the period of illegal confinement, which is not yet at an end, but which commenced May 12, 1970.

"28. That thereafter, beginning on the 12th day of May, 1971, the complainant was retried in the Circuit Court of Carroll County, Tennessee, on the charge of murder, the said retrial being concluded on May 13, 1971, by a jury verdict of not guilty.

"29. That the complainant and her counsel on that retrial had the use and benefit, knowledge, and probative evidentiary document and report dated March 26, 1970, from the F.B.I. Laboratory, to the effect that their scientific examination revealed no evidence of any blood, of any kind, human or animal, and in the said re-trial all material aspects of the proof were the same except as to the said report.

* * * * * *

"32. That the defendants individually, and jointly, by conspiring, combination, consort and agreement did conspire for the purpose of depriving either directly or indirectly, the complainant of the equal protection of the laws and of equal privileges and immunities under the laws; and under color of a state statute, ordinance, regulation, custom and usage of the State of Tennessee, caused the complainant to be subjected to the deprivation of her rights, privileges and immunities secured by the Constitution and laws of the United States, and while so doing were acting under color of state authority, and outside the scope of the jurisdiction of their respective offices, and without authority of law and that such actions were calculated or did, in fact, subject the complainant to a deprivation of her constitutional right to a fair trial and due process of law, and were the direct and proximate cause of the injuries, damages, wrongs and loss of liberty and freedom from May 13, 1970, to May 13, 1971, and as set out above."

[3] It is well settled that a prosecuting attorney, when acting in his official capacity, is immune from suit for damages, provided that his acts are within the scope of his jurisdiction and authorized by law. Peck v. Mitchell, 419 F.2d 575, 578 (6th Cir. 1970); Hurlburt v. Graham, 323 F.2d 723, 725 (6th Cir. 1963); Kenney v. Fox, 232 F.2d 288, 290 (6th Cir. 1956). See also Kauffman v. Moss, 420 F.2d 1270 (3rd Cir. 1970).

[4] However, the immunity of a prosecuting attorney from civil liability is not absolute:

> "[A] quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, cannot shelter himself from liability by the plea that he is acting under color of office." Lewis v. Brautigam, 227 F.2d 124, 129 (5th Cir. 1955).

In McCray v. State of Maryland, 456 F.2d 1, 3 (4th Cir. 1972) the court said:

> "The immunity of quasi-judicial officers such as prosecuting attorneys and parole board members derives, not from their formal association with the judicial process, but from the fact that they exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role in the judicial system." (Footnotes omitted)

To like effect see: Madison v. Purdy, 410 F.2d 99, 101 (5th Cir. 1969); Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965). Cf. Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972); Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970); Manning v. Ketcham, 58 F.2d 948 (6th Cir. 1932).

See also the order of the Supreme Court denying application for mandamus and certiorari in Garrison v. Brown, 405 U.S. 985, 92 S.Ct. 1253, 31 L.Ed.2d 469 (1972), involving an action for civil damages against District Attorney Jim Garrison of New Orleans for his prosecution of Clay Shaw on the charge of conspiring to assassinate President John F. Kennedy.

The Code of Professional Responsibility adopted by the American Bar Association contains the following provisions with respect to the duties of a public prosecutor:

> "EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused."
>
> "DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.
>
> "(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.
>
> "(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

[5] We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of "duties constituting an integral part of the judicial process." We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant.

Nothing in this opinion is intended to express any view as to the merits of the case. We do no more than hold that the District Judge erred in dismissing for failure to state a claim on which relief can be granted.

Reversed and remanded.

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UNITED STATES of America, Appellant,
v.
John P. CALANDRA, Appellee.
No. 71-1939.

United States Court of Appeals, Sixth Circuit.
July 27, 1972.

Proceeding, ancillary to a grand jury investigation, seeking suppression of certain evidence seized from place of business of a witness. The United States District Court for the Northern District of Ohio, Frank J. Battisti, Chief Judge, 332 F.Supp. 737, granted motion, and appeal was noted. Motion to dismiss appeal was denied, 455 F.2d 756. The Court of Appeals, William C. Miller, Circuit Judge, held that witness called before grand jury was a "person aggrieved" by alleged illegal search and seizure and, thus, had standing to move to suppress, notwithstanding that evidence would not be used against him in that he would be granted immunity.

Affirmed.

1. Searches and Seizures ⇐7(26)

Fourth Amendment claims may not be raised vicariously. U.S.C.A.Const. Amend. 4.

2. Searches and Seizures ⇐7(26)

Traditional principles of standing govern the matter of who may seek suppression of the "fruit" of an illegal search and seizure. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

3. Criminal Law ⇐394.6(1)

A motion to suppress by a target defendant is proper even where no prosecution is pending. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

4. Criminal Law ⇐394.6(1)

Source of a district court's jurisdiction to entertain a motion to suppress prior to indictment lies in the inherent disciplinary powers of the court. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

5. Criminal Law ⇐394.5(2)

It is the status of the individual as an "aggrieved person" at the time that he files a motion to suppress that is determinative of his or her recourse to such a motion and not the intention of the prosecution to file an indictment against the individual; fact that such an individual could not be harmed by the evidence, i. e. that he may be granted immunity, is irrelevant to any resolution of his standing to seek redress through a motion to suppress. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.; 18 U.S.C.A. § 2514.

6. Criminal Law ⇐394.1(1), 394.6(1)
Searches and Seizures ⇐3

It is the right of the citizen to security from illicit intrusions on privacy that the exclusionary principle seeks to guarantee; additionally the return and suppression of the fruit of an illegal search serves to give partial redress to the one whose right to privacy has been violated. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

7. Criminal Law ⇐394.5(2)

Fact that one has been called as a witness before a grand jury does not curtail his recourse as a "person aggrieved" to a motion to suppress evidence, on ground of illegal search and seizure, pending the grand jury proceeding. U.S.C.A.Const. Amend. 4; Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

8. Grand Jury ⇐23

The grand jury is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation.

9. Criminal Law ⇐394.6(1)

Purpose of suppression of the fruit of an unconstitutional infringement of privacy is to remove the incentive for such illicit activity. U.S.C.A.Const. Amend. 4.

10. Gaming ⇐60

Where only information in master affidavit pertaining directly or indirectly to tool company premises was observation that gambling suspect's automobile had been parked outside building on one occasion, observation that an automobile registered in company's names had been parked in front of suspect's residence and statement that an informant, described as having personal knowledge of suspect's bookmaking activity, had advised that owner of tool company would accept bets and lay off bets on sports events and was a close associate of suspect and used his home and office for bookmaking operation, warrant failed to establish probable cause to search tool company for gambling paraphernalia. U.S.C.A.Const. Amend. 4.

11. Gaming ⇐60

Under warrant authorizing search of place of business for bookmaking records and gambling paraphernalia, extensive four-hour search of business, which consisted of ground floor housing industrial machinery and inventory and second floor offices consisting of general office area and related facilities along with office of president and his secretary, and three-hour search of president's office meticulously examining virtually every document found therein was a general one far exceeding scope of the warrant and the permissible limits of the Fourth Amendment. U.S.C.A.Const. Amend. 4.

Shirley Baccus-Lobel, Roger A. Pauley, David Margolis, Robert D. Gary, Steven R. Olah, Attys., U. S. Dept. of Justice, Washington, D. C., Henry E. Petersen, Acting Asst. Atty. Gen., Crim.

cutor had knowledge of falsity of his witness's testimony or, if he did not have actual knowledge, had reason to believe that such testimony was false.

12. Criminal Law ⇐633(1)

Criminal trial is not a sporting event or a game of wits.

13. Criminal Law ⇐700

Prosecution need not prepare defendant's case.

14. Criminal Law ⇐700

Failure of defense counsel to conduct effective cross-examination, unless a deliberate trial tactic, cannot cure constitutional, prejudicial error committed by prosecution, although more diligent counsel might have cured error.

15. Criminal Law ⇐706

Public defender's failure to cross-examine state witness concerning points on which witness gave false testimony did not cure constitutional error in prosecution's use of testimony.

16. Habeas Corpus ⇐85.5(11)

Evidence in state prisoner's habeas corpus proceeding established that prosecution had suppressed a fingerprint.

17. Constitutional Law ⇐268(5)

Prosecution's suppression of evidence favorable to accused violates due process where evidence is material either as to guilt or punishment, irrespective of prosecution's good or bad faith.

18. Constitutional Law ⇐268(5)

Due process was violated by prosecution's suppression of third fingerprint on case found in coat said to be defendant's, even if prosecuting attorney was not aware of its existence, where state's expert testified that the first two prints were insufficient to exclude identification as defendant's, while it appeared that third print was not defendant's.

19. Criminal Law ⇐1165(1)

Federal harmless error test applicable to constitutional errors requires that in order to find error harmless, court must be able to declare it harmless beyond reasonable doubt.

20. Criminal Law ⇐1171(1)

State's failure to disclose to defendant evidence that coat, which prosecution claimed was defendant's, had been shown to defendant's fellow worker who stated that he had never seen defendant wearing such a coat, was not harmless error although coat was equally available to defendant.

21. Habeas Corpus ⇐45.3(1)

Habeas corpus court declined to consider merits of contentions as to which state defendant had failed to exhaust state remedies.

22. Courts ⇐365(3)

Although determinations of California Supreme Court in field of constitutional rights of accused have earned much respect and deserve great weight federal court cannot give state court's conclusions of law as to federal constitutional questions binding effect, but must draw independent conclusions of law.

23. Constitutional Law ⇐268(5, 8)

State defendant's right to due process of law was violated, and cumulative effect of errors was not harmless, where prosecution permitted witness to give material testimony which prosecution knew or should have known was false, suppressed an exculpatory fingerprint and failed to disclose negative evidence indicating that coat, which prosecution claimed was worn by defendant, was not defendant's.

21. Criminal Law ⇐633(1)

Right to fair trial may not be abrogated even if evidence of guilt is overwhelming.

Roger S. Hanson, Woodland Hills, Cal., for petitioner.

Thomas C. Lynch, Atty. Gen., Thomas S. Kerrigan, Deputy Atty. Gen., Los Angeles, Cal., for respondent.

FERGUSON, District Judge.

Petitioner, a California state prisoner, seeks a writ of habeas corpus under 28 U.S.C. § 2254, challenging the validity of

a judgment of conviction in two counts entered in the Superior Court in Los Angeles on August 10, 1961. The first count charged murder in the first degree, for which the jury fixed the penalty at death; in addition, petitioner was sentenced to a term of imprisonment not to exceed ten years on count two, assault with a deadly weapon with intent to commit murder. The judgment was affirmed by the California Supreme Court on automatic appeal [Calif.Pen.Code § 1239(b)]. People v. Imbler, 57 Cal.2d 711, 21 Cal.Rptr. 568, 371 P.2d 304 (1962). Thereafter, petitioner sought a writ of habeas corpus in the California Supreme Court. The writ was denied on the basis of a referee's findings following an evidentiary hearing. In re Imbler, 60 Cal.2d 554, 35 Cal.Rptr. 293, 387 P.2d 6 (1963), cert. denied, 379 U.S. 908, 85 S.Ct. 196, 13 L.Ed.2d 181 (1964).

Petitioner then filed a second petition for a writ of habeas corpus in the state courts challenging solely the penalty of death. During the penalty phase of petitioner's trial, the prosecution stated to the jury that life imprisonment, because of the possibility of parole, did not necessarily mean permanent incarceration. The trial court instructed the jury that it could consider the possibility of parole after seven years' imprisonment in determining the penalty. Holding these statements and instructions to be improper, the California Supreme Court reversed the judgment imposing the death penalty. In re Imbler, 61 Cal.2d 556, 35 Cal.Rptr. 293, 387 P.2d 6 (1964). On remand, petitioner was sentenced to life imprisonment on the murder count.

The federal petition was originally heard in the Eastern District of California. The District Court there denied the petition, holding it to be premature under McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1931), since petitioner was also serving concurrent sentences under independent convictions not then being challenged. The Court of Appeals for the Ninth Circuit reversed the denial following the United States Supreme Court's overruling of McNally v. Hill, *supra*, in Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). Imbler v. Oliver, 397 F.2d 277 (9th Cir. 1968). Thereafter, the case was transferred to this District pursuant to 28 U.S.C. § 2241(d).

The petition for a writ of habeas corpus is conditionally granted for the reasons set forth herein.

I

[1] A federal evidentiary hearing on petitioner's claims was not held since the same contentions were presented in the writ of habeas corpus before the California Supreme Court. A referee appointed by that court conducted a full and adequate hearing, and since there is no major dispute as to the basic facts, this court need not conduct a further hearing. Townsend v. Sain, 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); Jackson v. California, 336 F.2d 521, 522 (9th Cir. 1964).

The complete reporters' transcripts of petitioner's trial and of the state habeas corpus hearing, as well as the referee's report thereon, are part of the record herein and have been fully considered by this court.

II

About 8:30 on the evening of January 4, 1961, two men entered a Los Angeles grocery store owned by Morris Hasson. Mr. Hasson was, at the time, kneeling behind the counter. His wife, then also in the store, approached the apparent customers; by that time, Mr. Hasson had risen with a peculiar look on his face by which, his wife testified, she knew something was wrong. When she started to question him, she observed a gun barrel protruding from the coat of one of the men. As she asked what the men wanted, the gun was fired, killing Mr. Hasson. The two men walked out of the store and headed in opposite directions, the gunman walking west.

Mrs. Hasson testified that the killer was wearing a hat and coat, and that she did not see his face and could not identi-

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fy him. She subsequently identified the accomplice as one Leonard Lingo.

There was no physical evidence whatsoever connecting petitioner with the crime. The most significant evidence was the testimony of one Alfred Costello, called by the prosecuting attorney the "People's principal witness".

Mr. Costello testified that about 8:30 in the evening involved he was directly across the street from the Hassons' grocery store when two men in the store, one wearing a dark coat and a "slouched down" hat, attracted his attention. Costello stated he heard a shot and, as he walked across the street, he attempted to intercept the killer who he then noticed was holding a gun. At this point he was eight to twelve feet from the man, who then made a right-hand turn heading west. Costello identified him as petitioner. Costello testified that he followed the killer about 25 feet into an alley. The killer started to run, losing his hat. He hesitated, then entered a parking lot. Costello then yelled, "Stop or I'll shoot". The killer turned and fired at Costello who, standing 15-20 feet away, heard the bullet pass him and strike against a building. The killer then ran through the parking lot and finally into a third parking lot, Costello still following. Near the attendant's office of that lot, the man discarded his coat, then doubled back through the alley and toward Hassons' store. Costello temporarily lost sight of him, then spotted him again going into a Y.M.C.A. building. Thereafter, Costello returned to the parking lot to recover the coat, and discovered the gun and a razor case in a pocket.

In addition, there was testimony from one Billy Hillen, who was leaving the Hassons' store as the killer and his accomplice were entering it. The men passed within four or five feet of Hillen. Hillen testified that petitioner was one of the men, wearing a brown overcoat and green hat, and that Lingo was the other. When he was about six or seven steps outside the store, Hillen heard a shot and turned back. He stated that petitioner was by that time standing outside of the store as Costello and a man named Fritz approached. Fritz said "jump him", but Hillen, who saw the gun, said to let him go.

The following day, Hillen recovered the hat worn by the killer.

Alonzo Dunlop, the third eyewitness, was an attendant in one of the parking lots through which the killer had run. Dunlop testified that he saw petitioner walk through his lot that night about 8:50 p. m. He said he heard no gunshots, although Costello stated the killer had fired at him in one of the adjacent parking lots. The only unusual sound he testified he did hear was the scream of Mrs. Hasson, and this only after the killer had left his lot. He further testified that he knew Costello by sight, but had not seen him in the lot that evening.

Ten days later, on January 14, 1961, petitioner, Leonard Lingo and one Jerry Mayes attempted an armed robbery of a service station in Pomona, California. Lingo died as the result of a traffic accident following the attempted robbery and Mayes was captured. Petitioner subsequently surrendered to the Pomona police.

Attempting to solve the Hasson murder case, the Los Angeles police showed Mrs. Hasson photographs of Lingo. She identified Lingo as the man who accompanied the murderer of her husband.

On January 30, 1961, prior to the trial, witnesses Costello, Hillen, Dunlop and Fritz were taken to a lineup. The lineup was conducted in four or five groups, with ten to twelve men in each group. When Hillen saw petitioner in the last group, he stated out loud, in the hearing of the other witnesses, "That's him". Hillen admitted making that statement, Dunlop testified as to it, and Costello also heard such a comment. Petitioner was then identified by the witnesses. Nevertheless, Hillen requested to see him wearing the hat and coat recovered from the vicinity of the murder. Several of the men were required to don the clothes, although there is some dispute as to

whether any of them were similar in build to petitioner, and Hillen again identified petitioner.

Petitioner's defense was an alibi. He testified that he and three other persons, along with his girl friend for part of the evening, visited about five drinking or dancing establishments, which he either named or described, from about 5:30 p. m. until after midnight on the day the murder occurred. He was able to identify fully only two of his companions: Jerry Mayes, who also testified about those activities although he found it difficult to be certain about the exact date, and one Robert Mahon. Also in the group were a man petitioner thought was named George, in whose car the group travelled from one place to another, and petitioner's girl friend, Ann, whose last name he could not recall.

In addition, while petitioner admitted to his participation in the Pomona robbery, he denied knowing Lingo before the 14th. He testified, as did Mayes, that the first time he and Mayes met Lingo was in the early morning of the 14th, the introductions having been made by a man named Dale who was not located at the time of trial.

Subsequent to the trial, investigation produced further corroboration by new witnesses both of petitioner's alibi and of his statement with regard to his first meeting with Lingo on January 14, ten days after the murder. The prosecution made these facts known to the Governor's office and the California Adult Authority (the state parole board), stating that "investigation has revealed a consistency in Imbler's position which is now corroborated by others". The man named Dale, who introduced petitioner and Lingo on January 14, had been found, and the owner of the car in which the drinking rounds were made on January 4th, whom petitioner thought was named "George", was also located and corroborated the alibi.

III.

Petitioner alleges that prejudicial error occurred during testimony of the witness Costello primarily, but not exclusively, involving that witness' credibility.

One instance of such error is claimed to be in the following testimony:

"Q [By defense counsel] * * * Did you see any mug shots, as they are called, or small pictures of the defendant that you remember—Mr. Imbler—before you went to a line up?

"A [By Costello] No.

"Q Did the officers bring you out and show you a number of pictures?

"A Well, I looked through the mug books, which is customary, I think.

"Q You did look through a mug book?

"A Yes.

"Q You saw a number of pictures then of different people as possible suspects?

"A Yes.

"Q And among them were you able to find anybody that caused you to think this might be the person among the mug shots?

"A Yes, but I kept that to myself. I didn't reveal it at that time.

"Q Did you see any mug shots of the defendant particularly?

"A I believe I did."

Thus, in Costello's testimony there appears a possible contradiction as to whether he saw pictures of petitioner prior to the lineup. However, it is possible to interpret the testimony, and the jury may well have so interpreted it, as meaning that Costello did not see any mug shots of petitioner before the lineup, and was shown the "mug book" only after the lineup had already taken place. In fact, both Costello and Hillen were shown photographs of petitioner on January 25, 1961, five days prior to the lineup. Such pictures were not part of a "mug book", but were shown along with some twelve or so other pictures. At that time, on January 25th, Costello did not keep his identification to himself; rather, both he and Hillen identified Imbler as a "good possible suspect". There-

fore, to the extent that Costello answered that he had not been shown pictures of Imbler, or at least did not see them apart from any "mug books", he was not telling the truth. At least one of the police officers involved in the investigation, who knew of petitioner's pictures being shown to the witnesses, was always present in the courtroom during the trial; yet no attempt was made to correct this inaccuracy. Although this court cannot conclude that Costello willfully perjured himself on this issue, it is clear that his answer was false and that the state, having knowledge of such falsity, permitted it to stand.

The witness Hillen similarly testified:

"Q [By defense counsel] * * * Did the officers show you at any time some small pictures of different men to see if you could pick out a man from some pictures?

"A [By Hillen] I looked at the mug books. That's standard procedure."

Again:

"Q * * * [D]id you ever see any pictures of the defendant, if you remember?

"A Not that I remember."

As indicated above, this answer was also false, and the state had knowledge of such falsity.

Further false testimony was given by Costello on matters relating to attempted impeachment of his testimony. In the following testimony on redirect examination, the prosecutor led Costello to testify concerning a previous "voluntary commitment" to a state mental hospital, when in fact the commitment had been mandatory upon a court adjudication of insanity:

"Q [By District Attorney] Did you voluntarily commit yourself in 1946 to any of these state hospitals?

"A [By Costello] Yes, I did.

"Q And what were the circumstances of your voluntarily committing yourself?

"A Well, in '46 and '47 when I was committed to Mendocino, I got in a little trouble with the law and I was represented by the Public Defender's Office at that time, and it was suggested to me that I enter a plea of not reasonably—not guilty by reason of insanity, and I was furnished a copy with the right answers to give the doctors at that time, which caused me to be committed to Mendocino."

Costello denied on the stand that he had been adjudicated insane, although both the prosecutor and defense counsel knew the denial to be false from a "make sheet" each had in his possession. The denial, however, was stricken in order to allow the court to hear legal argument on the propriety of the inquiry. When Costello was subsequently asked if he knew, of his own knowledge, whether the commitment was based upon a finding of insanity, the prosecution's objection was sustained and the witness was not permitted to answer. The jury had already, however, heard Costello's denial, albeit subsequently stricken.

Thus the prosecutor, by leading the witness in regard to a *voluntary* commitment, not only introduced erroneous testimony, but also succeeded in preventing the truth from being introduced.

At the state habeas corpus hearing the prosecuting attorney testified that, so far as he could remember, he did not see the "make sheet" on Costello prior to trial. Just before Costello had taken the stand, the prosecutor had a short conversation with him, at which time Costello told him of a 1951 felony conviction; he did not at that time say anything about hospital commitments. The prosecutor further testified that when he saw the "make sheet" for the first time the public defender showed it to him. Before cross-examination of the witness. After seeing the "make sheet", he talked with Costello, confronting him with the new facts. Costello then admitted to various mental hospitalizations, but told the prosecuting attorney that the 1946 admission was a voluntary commitment because he [Costello] had

tarily pleaded innocent by reason of insanity knowing that the result would be hospitalization. Having had before him the "make sheet" that stated that Costello had been "found insane now and at time of crime committed to Mendocino", the prosecutor testified about the discussion with the witness:

"Mr. Costello told me that he was voluntarily committed. He gave me the reasons why he thought it was a voluntary commitment. Rather than argue with him, I just accepted his own wording by his statement that he pleaded not guilty to—by reason of insanity and was furnished certain answers by the Public Defender. In his mind, he thought it was a voluntary commitment. I wasn't going to argue with him. Let him explain it to the jury. The jury could make the decision. That was my attitude."

It therefore appears that the prosecutor in fact knew the commitment had not been voluntary, but, in deference to the witness, he not only refrained from using the term involuntary, but used the opposite and clearly erroneous term. Thus, whether he intended to do so or not, the prosecuting attorney knowingly created an incorrect impression of the most critical aspect of the commitment.

In addition, during cross-examination defense counsel attempted to elicit testimony of Costello's criminal record.

"Q [By defense counsel] Mr. Costello, have you ever been convicted of a felony?

"A [By Costello] Yes, I have. I am glad you asked that question.

"Q And that was in 1951, was it?

"A That's right.

"Q And another one in 1955, is that true?

"A No. You are wrong.

"Q Just one felony conviction, 1951?

"A That's right."

The "make sheet" which the prosecutor saw prior to the cross-examination indicated at least one other felony conviction to which defense counsel referred in the above testimony, and possibly others. However, on redirect examination, rather than correcting the false statement, the prosecutor perpetuated it:

"Q [By prosecutor] Now, you said that you were convicted of a felony in 1951. What felony was that?

"A [By Costello] Forgery."

The prosecutor admitted in the state hearing that he did not pursue, in his conversation with Costello prior to redirect examination, the leads suggested by the "make sheet". Thus, while the "make sheet" alone suggested that Costello might be a six-time felon, the prosecution "believed" Costello's statement that he was convicted only once. In summary, Costello's testimony concerning his felony convictions was false, and the prosecutor had information that it was false yet declined to introduce the truth.

On redirect examination of Costello, in an attempt to rehabilitate the witness, the prosecution elicited the following testimony, having previously been advised by Costello of it:

"Q [By prosecutor] Now, then after your release from any of these hospitals, did you attend any universities or schools?

"A [By Costello] Yes, I did. I completed two years of my university training—a four year course in two years—and received a degree from the University of California.

"Q And what type of degree was that?

"A Industrial relations, and later on I went to night school at SC, and received an Engineer's degree.

"Q When was it that you received the Engineer's degree?

"A '54."

Costello further testified that his earnings for the past four years had "averaged around nine to ten thousand a year".

Such testimony was admittedly false. The prosecutor, however, at the state habeas corpus hearing, testified that, at

the time of the trial, he did not know it to be false, and, having just been advised by Costello of that information during a recess, did not have sufficient time to verify it.

Petitioner contends that the prosecution *must* have known that this testimony, which it elicited, was false. He further argues that only through gross negligence could the prosecutor have failed to conclude that the testimony was perjured. If in fact the prosecutor did fail to draw that conclusion, petitioner argues that the state should nevertheless be charged with it. It is clear that the state had knowledge during the trial of the following facts about Costello:

1. That Costello had at least three previous convictions;

2. that in addition to his convictions he had been arrested on forgery and bad check charges on numerous occasions;

3. that he was committed to Mendocino State Mental Hospital on an adjudication of insanity in March, 1946;

4. that he was recommitted to Mendocino State Mental Hospital in February or March, 1949;

5. that he spent time in Camarillo State Mental Hospital in 1947 or 1948;

6. that at the time of trial there was a charge pending against him in Highland Park, California, for passing a bad check;

7. that at the time of trial there were outstanding checks to Mrs. Hasson and to the hotel at which he was staying for which there were either insufficient funds or no bank account; and

8. that he was in prison under 1951 conviction until November, 1953, although testifying that by 1954, one year after he was released from prison, he had received two degrees from two universities.

With actual knowledge of these facts, or at least having them directly before him, the prosecutor elicited from Costello the testimony that the witness received a university degree in industrial relations, completing a four-year degr in one-half the normal time, and a s ond full degree in engineering, a tota new and different academic subject, a university night school within a ye after his release from prison.

In addition, Costello was allowed testify that for the past four years h earnings averaged nine to ten thousa dollars a year, when in fact the prose tion knew that Costello had recently wr ten bad checks for relatively sm amounts, of which some were still o standing and one of which was the ba of a pending criminal proceeding.

The police learned of these facts d ing their investigation of the ca Moreover, aside from their knowledge communication thereof to the prosec ing attorney, the existence of the pend charge was also independently known the prosecuting attorney. During a cess of the trial, he talked to two po officers from Highland Park who s they wanted to speak with Costello ab the charge, and he asked them to w until Costello was finished with his t timony. The prosecutor's final atte at rehabilitation came just three qu tions after he referred to the witn single admitted prior conviction (though the prosecution knew there h been more than one conviction):

"Q [By prosecutor] Incidenta since you have been in trouble w the law have you been trying straighten yourself out?

"A [By Costello] Very much

This testimony was elicited despite fact that the prosecutor knew of pending Highland Park charge, had session of Costello's "make sheet" wh indicated at least two subsequent fenses and a subsequent charge of pa violation, and had available knowledg or actually knew of the other curre outstanding bad checks.

[2] It is clearly established tha criminal conviction obtained through prosecution's knowing use of perj or false evidence violates the defend right to due process of law as prote

the Fourteenth Amendment to the federal constitution. Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935). See also, *e. g.*, Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); Hysler v. Florida, 315 U.S. 411, 62 S.Ct. 674, 86 L.Ed. 932 (1942); Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); Evans v. Eyman, 363 F.2d 540, 542 (9th Cir. 1966).

There is no doubt that false testimony was given at petitioner's trial by Costello in the following respects: as to whether Costello

(1) saw petitioner's mug shots prior to the lineup,

(2) was voluntarily or involuntarily committed to Mendocino State Mental Hospital in 1946,

(3) had previously been convicted of more than one felony,

(4) attended any universities or obtained any degrees therefrom subsequent to his release from the mental hospitals and from prison,

(5) earned an average of $10,000 a year for the four years preceding the trial, and

(6) had been trying to "straighten" himself out since he had been "in trouble with the law".

Further false testimony was given with respect to the mug shots from the witness Hillen.

[3, 4] In order, however, for such false testimony to warrant the relief here sought, it must have been material to the case. The court finds that the six enumerated items of false testimony were in fact material. The first item, relating to Costello's seeing petitioner's picture prior to the lineup, was material to the vital issue of identification. Each of the other items was material to the witness' credibility. It is no longer open to question that such materiality is within the constitutional rule set forth above. The Supreme Court conclusively settled that issue in Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959):

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence * * *."

The Court there cited with approval the following passage from People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854-855:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."

See also, Giles v. Maryland, supra 386 U.S. at 74, 87 S.Ct. 793, and Loraine v. United States, 396 F.2d 335 (9th Cir.), cert denied, 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed.2d 270 (1968). The Court of Appeals in this Circuit has stated:

> "Evidence available for use at the trial may be material within the meaning of this rule, even though it goes only to the credibility of a witness."

Loraine v. United States, supra at 339.

Cases granting relief for failure to make disclosure of evidence or for use of false evidence relating only to credibility are numerous. For example, in Powell v. Wiman, 287 F.2d 275 (5th Cir. 1961), the prosecution successfully objected to the introduction of any evidence of its key witness' mental condition, although it knew the witness had previously been in mental hospitals; that fact was not known to the defense. Such conduct was held to be a violation of the prosecution's duty. In Ingram v. Peyton, 367 F.2d 933

(4th Cir. 1966), the court held that the prosecution's apparently unintentional misnaming of its chief witness denied petitioner of a fair trial since it prevented his attorney from discovering the witness' prior criminal record, a matter relating solely to credibility.

See also, United States ex rel. Hill v. Deegan, 268 F.Supp. 580 (S.D.N.Y.1967), where the key prosecution witness was presented as an honorably discharged veteran who, in addition, was receiving pension as a wounded veteran. This portrait of a good citizen tended to minimize the rather substantial variations that occurred in the witness' testimony. Although at the time the prosecution did not know those facts were false, the court found that the prosecution already had reason to be wary of the witness' testimony. In addition, the prosecution had knowingly allowed certain additional false testimony to be given, which it allowed to stand until the witness himself corrected it. The *Deegan* case is similar to the one here in that the witness was permitted to create for himself a respectable, albeit false, background. Judge Frankel, in granting the petition for a writ of habeas corpus, remarked of the witness, "His gratuitous injection of these unchecked lies adds to the blemishes in an already infected record". 268 F.Supp. at 591. The same may be said in this case. Costello's testimony of his two degrees, his engineering position, and his $10,000 a year job was bound to have some effect in mitigating his less admirable, but factual, past history of which the jury was partially apprised. Thus, although only the witness' credibility was involved (except as to the mug shots), it was in this case extremely significant. It must be remembered that no physical connection between petitioner and the crime was ever established, causing the convictions to rest solely upon witnesses' identification of petitioner.

[5] It is, therefore, readily apparent that the evidence here involved was material within the meaning of the rule. The California Supreme Court also concluded, for example, that Costello's testimony of his college education was material, although the state referee had concluded otherwise. That court stated that on the question of perjury the test of materiality is whether the perjured testimony "could have probably influenced" the trier of facts. The court concluded that, "This testimony 'could have probably influenced' the jury to consider Costello rehabilitated after his capacity and competence as a witness had been put into question on cross-examination". In re Imbler, 60 Cal.2d 554, 564-565 n. 2, 35 Cal.Rptr. 293, 298, 387 P.2d 6, 11 (1963). This test of materiality is consistent with the general law as recognized by the federal courts; that is, whether the false testimony is capable of influencing the trier of facts. See, *e. g.*, Luna v. Beto, 395 F. 2d 35, 38 (5th Cir. 1968); United States v. Parker, 244 F.2d 943, 950-951 (7th Cir. 1957), cert. denied, 355 U.S. 836, 78 S.Ct. 61, 2 L.Ed.2d 48 (1957); Blackman v. United States, 108 F.2d 572 (5th Cir. 1940).

Respondent argues that another element of this rule also prevents its application to the instant case: knowledge of the falsity of such evidence on the part of the prosecution. Respondent does not seriously dispute the falsity of Costello's statements. Instead, it is argued that the prosecution, in effect, acted in good faith and without knowledge that such testimony was false. Lacking such knowledge, the state contends it cannot be responsible for any perjured testimony. This court does not agree.

It should be noted at this point that while it is true that the Supreme Court cases have as yet discussed only the "knowing" use of perjured testimony, there is authority for the proposition that one convicted on the basis of perjured testimony has been deprived of due process even when the prosecution was unaware of the perjury. In Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938), it was held that a state is constitutionally required to provide a corrective remedy upon discovery of the

perjury, and, absent such a remedy, federal habeas relief will be granted. There the state courts had held they lacked jurisdiction to grant the relief sought. The prosecutor did not know at the time of the trial that the testimony was false, and there was no suggestion that he should have known. Nevertheless, the United States Court of Appeals granted relief. See also, Smith v. Warden, Maryland Penitentiary, 254 F.Supp. 805 (D. Md. 1966); United States ex rel. Montgomery v. Ragen, 86 F.Supp. 382, 390 (N. D.Ill.1949).

The position that a criminal conviction founded in part upon perjured testimony cannot be constitutionally permitted to stand, whether such perjury is discovered prior or subsequent to trial, is therefore not without authority. The prejudice resulting to a defendant so convicted is not eliminated by the state's ignorance. Nor can it seriously be contended that there is absent any "state action", necessary to invoke the Fourteenth Amendment's protection, in the procuring of a state criminal conviction.

It should also be noted that the Supreme Court has, in its supervisory capacity over the federal courts, held that a new trial is required when it is discovered subsequent to trial that a key government witness in a federal criminal case was not reliable. Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed. 2d 1 (1956). The motion in that case had been made by the government. The Court recognized that ordinarily a defense motion for a new trial alleging new evidence which is "merely cumulative or impeaching" will not afford defendant a new trial. But in that case, as here, the witness' unreliability is conceded by all parties, and it is not a case of mere cumulative evidence. The Court, in *Mesarosh*, stated:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.
>
> "The government of a strong and free nation does not need convictions based upon such testimony. * * * The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial." [352 U.S. at 9, 14, 77 S.Ct. at 5, 8.]

This rule has been applied in the case of a collateral attack upon a federal conviction (via 28 U.S.C. § 2255 motion), Mitchell v. United States, 368 U.S. 439, 82 S.Ct. 402, 7 L.Ed.2d 429 (1962) (per curiam), and the California Supreme Court has been urged to adopt it by at least one justice of that court. People v. Riser, 47 Cal.2d 566, 592, 305 P.2d 1 (1956) (Carter, J., dissenting), cert. denied, 353 U.S. 930, 77 S.Ct. 721, 1 L.Ed.2d 724 (1957), appeal dismissed, 358 U.S. 646, 79 S.Ct. 537, 3 L.Ed.2d 568 (1959).

It is, however, under *Mesarosh*, still a rule applied only in the Supreme Court's supervisory capacity over federal trials, and despite the Court's statement that "there can be no other just result than to accord petitioners a new trial", the Court has not yet held that a different result would not comport with due process.

[6] Thus, the current law in this Circuit, contrary to the holding in Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938), is that "knowledge" by the prosecution is required to support a claim of denial of due process based upon the existence of prejudicial perjured testimony in a criminal trial. Marcella v. United States, 344 F.2d 876, 880 (9th Cir. 1965), cert. denied, 382 U.S. 1016, 86 S.Ct. 630, 15 L.Ed.2d 531 (1966); Black v. United States, 269 F.2d 38, 43 (9th Cir. 1959), cert. denied, 361 U.S. 938, 80 S.Ct. 379, 4 L.Ed.2d 357 (1960); Taylor v. United States, 221 F.2d 228 (9th Cir. 1955). This court need not consider the propriety of a departure from that rule since it finds the facts in this case to fall within it.

BEST COPY AVAILABLE

As set forth above, Costello's testimony was materially false in at least six respects. As to his false statement that he was "voluntarily" committed to a certain state hospital in 1946, when in fact he was committed because he had been adjudicated insane, this court finds that the prosecuting attorney had actual and definite knowledge that such statement was false. He not only permitted that statement to stand, an act itself expressly prohibited by Napue v. Illinois, 360 U. S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), but he purposely and intentionally led the witness to make it. Twice in his questioning, the prosecutor himself referred to the commitment as "voluntary", although his testimony at the hearing establishes that he indeed knew better. His justification for using that terminology, to be consistent with the witness' understanding of the situation, finds no basis in the law. Where a prosecutor knowingly permits false evidence to be introduced in a trial, and such evidence will inevitably create a false impression in the minds of the jury, no legal justification for that misrepresentation can exist. If the prosecutor wished to avoid for the sake of convenience the term "involuntary", he could have readily done so; there was absolutely no necessity for a substitute adjective, and use of an erroneous one was highly improper. The prosecutor also stated that he intended to let the jury "decide" with respect to the voluntariness of the commitment, having presented to them the "facts". The one fact, however, which he had, and which the jury did not, was that the commitment was not voluntary.

[7] Nor can it be said that there was at least some question about the nature of the commitment, and that the jury, having the "facts", was competent to judge the issue. It is not only affirmative misrepresentations which the prosecutor is prohibited from employing to secure a conviction; omissions and half-truths are equally damaging and prohibited, and their use is no less culpable. Jackson v. Wainwright, 390 F.2d 288, 293 (5th Cir. 1968). Creating an inference that a fact exists when in fact to the knowledge of the prosecution it does not, constitutes the knowing use of false testimony. *E.g.*, Turner v. Ward, 321 F.2d 918, 920-921 (10th Cir. 1963).

"Evidence may be false either because it is perjured, or, though not itself factually inaccurate, because it creates a false impression of facts which are known not to be true." Hamric v. Bailey, 386 F.2d 390, 394 (4th Cir. 1967). The court, in *Hamric*, recognized that the witnesses giving false testimony may have innocently done so through a lack of perception. Nevertheless, the state knew such testimony to be false, and failed to bring the true facts to the jury's attention. The conviction was held to violate the Fourteenth Amendment.

[8] The prosecution here also had knowledge of the fact that both Hillen and Costello had seen pictures of petitioner prior to the lineup. Such knowledge is conclusively indicated by the police log. One of the investigating police officers was present at the trial. Even assuming that the prosecuting attorney himself did not have such knowledge, the application of the rule is not precluded, for the prosecution is charged with the knowledge of its agents including the police. This principle is no longer subject to serious dispute. As it was held in Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964):

> "Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor."

The court there held that if the police failed to make proper disclosure, they were participating in the deception. Unlike the situation in Luna v. Beto, 395 F.2d 35, 40 (5th Cir. 1968), which distinguished its facts from those in *Barbee*, an investigating police officer in the case here was present in the courtroom, and was able to hear the testimony given.

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He could easily have corrected any misstatements of fact, or have brought the same to the prosecutor's attention. His action is no less that of the state than the actions of a prosecuting attorney. The contention that knowledge of perjured testimony must in fact be "brought home to the prosecuting officers" was expressly rejected in Curran v. Delaware, 259 F.2d 707, 712-713 (3d Cir. 1958), cert. denied, 358 U.S. 948, 79 S.Ct. 355, 3 L.Ed.2d 353 (1959), the court resting its decision upon Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). It is clear that the term "prosecution", for this purpose, includes at least the investigating officers as well as the attorneys. See also United States v. Consolidated Laundries Corp., 291 F. 2d 563, 570 (2d Cir. 1961), where even the conduct of government clerks was held to result in denial of due process; Estes v. United States, 254 F.Supp. 314, 318 (W.D.Tex.1966).

The fact that Costello had been convicted of more than one felony was also known to the prosecuting attorney. He admittedly examined the witness' "make sheet", which indicated *at least* two others. At the state hearing the prosecutor somewhat evasively testified that he had examined the "make sheet", but stated he had looked at it "as a whole", and not to its specific parts. Respondent cannot deny knowledge of facts which it had before it and which its agent admittedly examined. That the agent may have ignored those facts does not relieve the state of its responsibility. This is not mere negligence in failing to ascertain the facts. It is, at best, deliberate failure to take full notice of their significance. Thus, this case is vastly different from Taylor v. United States, 229 F.2d 826 (8th Cir.), cert. denied, 351 U.S. 986, 76 S.Ct. 1055, 100 L.Ed. 1500 (1956), in which petitioner attempted to charge the prosecution with "implied" knowledge of the contents of certain Narcotics Bureau records which allegedly would have refuted what a witness told Narcotics Agents. Here, petitioner need not rely on the mere existence of official records. The facts with which respondent is charged were either in fact known to the prosecuting attorney, the investigating officers, or were contained in documents which the prosecutor had actually examined.

By virtue of the same principles, the prosecution had not been attempting to "straighten out". Therefore, by asking Costello whether he had been so doing, the prosecutor knowingly attempted to create an impression in the minds of the jurors which he knew was false. For example, as discussed above, the prosecutor personally knew of the pending bad check charge against Costello. In addition, he had examined the witness' "make sheet" which indicated, among other things, two offenses and a parole violation in the period of time involved, and the police officer (who had been present at the trial) knew of additional bad checks issued by Costello that were still outstanding.

The final items of Costello's false testimony are the references to the witness' two alleged university degrees and his claimed annual income. This court has above described the facts known by the prosecutor about Costello. For a man with a history of felony convictions and state mental hospital commitments, such a success story is highly suspect, particularly when coupled with the known fact that Costello had been in prison until November of 1953, and yet he claimed to have received his second degree, through night school, at a university in 1954. This rather incredible story was given in full to the jury as the result of leading questions by the prosecutor.

[9] While the prosecutor claimed not to have disbelieved these outright lies, he clearly had cause to suspect them. The reckless use of highly suspicious false testimony is no less damaging or culpable than the knowing use of false testimony, and a conviction based upon

such evidence must suffer the same consequence.

Although there are no cases directly holding that testimony which should have been known to be false falls within the prohibition against the knowing use of perjured evidence, a number of cases have directed their inquires based upon that principle. Thus, for example, in McCloskey v. Boslow, 349 F.2d 119, 121 (4th Cir. 1965), it was held that the allegation that the prosecuting attorney should have known that certain testimony was perjured raises factual issues and "legal questions concerning the state's responsibility for the accuracy of what Dr. Boslow said". Again, in Wild v. Oklahoma, 187 F.2d 409, 410 (10th Cir. 1951), the court recognized this principle in finding that:

> "In the case before us there is no suggestion that the prosecuting officers knew or had reason to believe that any of the testimony offered at the trial of the petitioner was false or perjured."

See also Smith v. Warden, Maryland Penitentiary, 254 F.Supp. 805 (D.Md. 1966).

Moreover, in cases where evidence favorable or helpful to the defense has been withheld, due process has consistently been held to be violated even if the evidence is only negligently withheld. That rule was stated in Thomas v. United States, 343 F.2d 49, 53–54 (9th Cir. 1965):

> "The well-recognized rule thus invoked is that a conviction cannot stand where a prosecutor has, either wilfully or negligently, withheld material evidence favorable to the defendant. As the Second Circuit said [in United States v. Zborowski, 271 F.2d 661, 668 (2d Cir. 1959)]:
>
> "'The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried.'"

See also, *e.g.*, Ingram v. Peyton, 367 F.2d 933 (4th Cir. 1966); Levin v. Katzenback, 124 U.S.App.D.C. 158, 363 F.2d 287 (1966); Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964); United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961); United States v. Birrell, 276 F.Supp. 798, 817–818 (S.D.N.Y. 1967); United States v. Sobleh, 203 F. Supp. 542 (S.D.N.Y.1961), aff'd, 301 F. 2d 236 (2d Cir.), cert. denied, 370 U.S. 944, 82 S.Ct. 1585, 8 L.Ed.2d 810 (1962); United States v. Heath, 147 F.Supp. 877 (D.Hawaii 1957), appeal dismissed, 260 F.2d 623 (9th Cir. 1958) (approving the district court's holding) (the *Birrell* and *Heath* cases involving apparently inadvertent loss of certain documents).

It would hardly be logical, in light of those cases, to hold a prosecutor to a lower degree of diligence with respect to the introduction of false evidence.

[10] Nevertheless this court need not now decide whether mere negligence in allowing this false testimony to be given would warrant the relief here sought. In this case, more than mere negligence has been established. The prosecutor either had reason to believe or in fact knew that each item of evidence discussed above was untrue. The state cannot now disclaim knowledge of such falsity on the ground that its agent, the prosecutor, ignored the facts before him or that the investigating officers failed to disclose those facts to him. Due process of law does not tolerate a prosecutor's selective inattention to such significant facts. It requires that he exercise good faith in prosecuting that case. Such good faith is not fulfilled where the prosecutor allows his witness to give false testimony of which he has advance knowledge and the accuracy of which he has reason to suspect. The duty of good faith is not merely a negative one, to omit from one's case evidence that lies. It imposes as well an affirmative duty to

avoid even unintentional deception and misrepresentation, and in fulfilling that duty the prosecutor must undertake careful study of his case and exercise diligence in its preparation, particularly where he is confronted with facts tending to cast doubt upon his witness' testimony. The prosecutor's objective is justice; his role is not that of a mere advocate. The goal of justice is hardly satisfied by less.

[11] Therefore, as to each of the six items of false testimony described above, the court finds that the prosecutor had knowledge of such falsity, or, if he did not have actual knowledge, that he had reason to believe such testimony was false and his reckless use thereof in disregard of such reason is to be treated the same as knowing use of false testimony.

IV

[12] Respondent's position is that any errors allegedly committed by the prosecution could have been cured by action of defense counsel. Thus, it is argued that if Costello's testimony, for example, of his university education was suspect, defense counsel should have cross-examined the witness on that issue. It is clear that defendant's public defender should have done so. Nevertheless, his failure to do so will not bar relief. A criminal trial is not a sporting event nor a game of wits. See, *e.g.*, Giles v. Maryland, 386 U.S. 66, 100, 87 S. Ct. 793, 810, 17 L.Ed.2d 737 (1967) (Fortas, J., concurring):

> "A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim."

See also Levin v. Katzenback, 124 U.S. App.D.C. 158, 363 F.2d 287, 291 (1966); Curran v. Delaware, 259 F.2d 707, 711 (3d Cir. 1958), cert. denied, 358 U.S. 948, 79 S.Ct. 355, 3 L.Ed.2d 353 (1959).

[13–15] It is true, as respondent urges, that the prosecution is not required to prepare defendant's case. See United States v. Gleason, 265 F.Supp. 880, 884 (S.D.N.Y.1967). Nevertheless, the failure of defense counsel to conduct an effective cross-examination, unless a deliberate trial tactic, cannot cure constitutional, prejudicial error committed by the prosecution. The fact that a more diligent counsel might have cured that error does not negate it. See Levin v. Katzenback, 124 U.S.App.D.C. 158, 363 F.2d 287, 291 (1966). See also the concurring opinion of Justice White in Giles v. Maryland, 386 U.S. 66, 82, 87 S.Ct. 793, 801 (1967), wherein he noted that, "Had petitioner's counsel been *less* diligent, the false testimony might rise to the level of a *Napue* violation" (emphasis added). This is not a case such as United States v. Sobell, 142 F.Supp. 515 (S.D.N.Y.1956), aff'd, 244 F.2d 520 (2d Cir.), cert. denied, 355 U.S. 873, 78 S. Ct. 120, 2 L.Ed.2d 77 (1957), where it may be said that defense counsel's failure to cross-examine a witness with respect to a particular issue was a matter of specific and deliberate strategy for which defendant, upon hindsight, cannot now complain.

V

Petitioner further contends that the prosecution suppressed certain exculpatory fingerprint evidence contained on a razor case. The case was found in the coat discarded by the killer. At the trial, a police fingerprint expert testified that he found two fragmentary prints on the case, but that they were not sufficient to permit a comparison with any other prints. He stated that there was more than one point of identification in each fragment "constituting possibly three or four points", but that at least ten points are needed for an identification. In addition, he agreed with the prosecutor's statement that if he did have a fingerprint exemplar, it would not have done "any good" because he didn't have a sufficient fragment.

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After the trial, an expert working on petitioner's behalf discovered a *third* fingerprint on the razor case. The third print was positively identifiable and is admitted not to be petitioner's. All the evidence indicates that this print was in fact on the case at the time of trial.

At the state habeas corpus hearing, the police fingerprint expert was reluctant to admit to the existence of the third print. He first testified that, as he "recalled", there were two fingerprints on the razor case. Upon viewing the case, however, he added, "In my testimony a moment ago I said that there were two. I see that there are three, actually." When asked whether the third print could be identified, he stated that he didn't "believe so". He further testified, after viewing an unmagnified photograph of the print, that he was unable to say whether or not the print was petitioner's. Exemplars of petitioner's prints were then given to him during noon recess at which time he compared them with a *magnified* photo of the third print. His testimony about that second examination was somewhat evasive:

"Q [By petitioner's counsel] [D]id I show you at noon the prints of Mr. Imbler that were made by Mr. Meyers, I believe it was, the other day?

"A [By police fingerprint expert] Yes, I glanced at them.

"Q Did you look at them and compare them with the photograph of the print appearing on the inside of the razor case?

"A No. I didn't make an accurate comparison.

"Q Did you make enough of an examination to draw a conclusion as to whether or not the magnified photograph is one of the prints appearing on the exhibits that were prepared by Mr. Meyers?

"A I would say that they weren't.

"Q Well, did you make enough of an examination to form an opinion, then?

"A That is a more or less casual opinion. As I say, I didn't compare it with a magnifying glass, but I would say that they weren't, generally."

Thus, while the state's expert was unable to make a definite statement with regard to the unmagnified pictures, he was able to conclude, albeit reluctantly, that the print as it appeared in the magnified photo was not petitioner's. After later examining the prints during an overnight recess, he finally made a clear and unqualified statement that the third latent print was not petitioner's.

His testimony raises an additional problem. He stated that the first two latent prints were too fragmentary to be of "any good", even if compared with exemplars. Nevertheless, he did in fact make such comparisons, as admitted in his testimony and shown by police logs of the investigation.

Thus, the function apparently served by fingerprint testimony was to imply to the jury that the prints on the razor case *might* have been petitioner's. Had the jury known that the third print on the case was not petitioner's, they clearly would have reached a different conclusion with respect to this evidence.

[16, 17] The court finds that evidence of the third fingerprint was suppressed. The referee at the state hearing found, however, that such evidence was equally available to defendant at the trial. The California Supreme Court adopted that conclusion, stating in addition that although in some cases the negligence of one of the state's representatives may result in a denial of a fair trial, in this case it did not. The court stated that "[the police investigators'] negligence has obstructed the defendant in challenging the case against him, it is not a ground for collateral attack", and added that the razor case had been available to petitioner during the trial. In re Imbler, 60 Cal.2d 554, 567, 35 Cal.Rptr. 293, 387 P.2d 6 (1963). This court respectfully disagrees.

"The suppression by the prosecution at the trial, of evidence favorable to an accused violates due process where the evidence is material either as to guilt or punishment, irrespective of the good or bad faith of the prosecution [citations omitted]."

Loraine v. United States, 396 F.2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933, 89 S.Ct. 292, 21 L.Ed.2d 270 (1968). See also Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967).

[18] There can be no doubt that had evidence of the third print been deliberately suppressed by the police, even if the prosecuting attorney was not aware of its existence, due process would clearly have been violated. See, for example, Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964), where the police had suppressed the results of fingerprint and ballistics analyses which tended to cast doubt upon whether the gun allegedly used was in fact the murder weapon. The same result follows if the material is negligently suppressed.

As our Court of Appeals has stated in Thomas v. United States, 343 F.2d 49, 53 (9th Cir. 1965):

"[A] conviction cannot stand where a prosecutor has, either willfully or negligently, withheld material evidence favorable to the defendant."

As to negligent suppression, see also the cases cited *supra* p. 808.

VI

Costello testified that as the killer fled he discarded his coat, which Costello later recovered and turned over to police. At the trial, the recovered coat was identified by Mrs. Hasson, as well as by Costello and Hillen as that worn by the killer.

Prior to trial, police exhibited the coat to a fellow worker of petitioner who testified at the state habeas corpus hearing that he had told police he had never seen petitioner wearing such a coat, or anything like it. This evidence, petitioner contends, should have been disclosed to him.

The California Supreme Court stated that this evidence, tending to prove that the coat was not petitioner's, "would have been merely negative evidence of little probative value and could not have affected the outcome of the case". In re Imbler, 60 Cal.2d 554, 568, 35 Cal.Rptr. 293, 301, 387 P.2d 6, 13 (1963).

The state, at oral argument, explicitly conceded that failure of the prosecution to disclose this evidence to the defense was error. The same admission is made by implication in the remarks of the California Supreme Court. However, the state contends that such error was harmless.

[19, 20] The federal harmless error test, to be applied to constitutional errors, requires, as noted below, in order to find such an error harmless, that the court be able to declare it harmless beyond a reasonable doubt. Because no physical connection between the tangible evidence and petitioner was made, and because the jury was prevented from hearing any testimony tending to negate any such connection, although such testimony was available, such a declaration in this case is impossible. To hold otherwise would be to indulge in pure speculation, and would be a clear violation of the federal standards. See, for example, United States ex rel. Hill v. Deegan, 268 F. Supp. 586, 591 (S.D.N.Y.1967).

The court similarly dispenses with the argument that such evidence concerning the coat was equally available to petitioner. The record in this case nowhere indicates that petitioner even knew of the coat's existence before it was introduced at the trial. If petitioner is in fact innocent, he would not have known there was a coat involved, and it was therefore, for all practical purposes, not

available to him. See Lee v. United States, 388 F.2d 737 (9th Cir. 1968).

VII

[21] Petitioner has raised substantial questions concerning his rights at the pre-trial lineup procedure during which he was identified. See, *e.g.*, Foster v. California, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969). However, this court need not rule upon those contentions in light of its decision on the other issues. Moreover, petitioner has failed to exhaust his state remedies on these grounds, and this court therefore declines to consider their merits.

VIII

The harmless error doctrine, as applied to federal constitutional error, is set forth in Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967):

> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Although the Supreme Court stated it was merely adhering to the test provided in Fahy v. Connecticut, 375 U.S. 85, 86, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963) (whether there was a reasonable possibility that the evidence might have contributed to the conviction) its restatement of the rule in fact appears to be more stringent. It should be noted that *Chapman, supra*, was not decided until after the California Supreme Court's adverse determination of petitioner's claims.

[22] The California Supreme Court is without question at the forefront of advancing and protecting the constitutional rights of the accused. Although this court cannot give a state court's conclusions of law as to federal constitutional questions binding effect, Townsend v. Sain, 372 U.S. 293, 318, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), determinations of the California Supreme Court in this field have earned much respect and deserve great weight. Nevertheless, this court must draw independent conclusions of law, and, in light of the United States Supreme Court's recent restatement of the federal harmless error rule, it must respectfully disagree with the California court.

[23, 24] The total and cumulative result of all the constitutional errors committed at petitioner's trial prohibits a declaration that, beyond a reasonable doubt, those errors were harmless. This court finds upon review of the record of the entire trial that petitioner was denied a fair trial, and that his federally protected right to due process of law was thereby violated. Even if evidence of petitioner's guilt were overwhelming, the right to a fair trial may not be abrogated. Jackson v. California, 336 F.2d 521, 523 (9th Cir. 1964).

Therefore, this court concludes that the harmless error doctrine does not save petitioner's conviction.

IX

ORDER

It is the order of the court that unless the State of California shall institute proceedings within 60 days from the date this order becomes final to retry the petitioner, a writ of habeas corpus will be granted by this court.

It is further ordered that the court reserves jurisdiction over the parties in regard to this cause.

It is further ordered that the clerk this day shall serve copies of this order by United States mail upon the Attorney General of the State of California, the respondent, petitioner and his counsel, the District Attorney of Los Angeles County, the Honorable Joseph A. Wapner, Presiding Judge of the Superior Court of Los Angeles County, and the Honorable William B. Keene, Presiding Judge of the Criminal Courts Department of the Superior Court of Los Angeles County.

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FILED

JUN 30 1972

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY

JUN 30 1972

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL KERN IMBLER,

Plaintiff,

vs.

RICHARD PACHTMANN, et al.,

Defendants.

CIVIL NO. 71-123-RJK

OPINION AND ORDER GRANTING DEFENDANT RICHARD PACHTMANN'S MOTION TO DISMISS AND DIRECTING ENTRY OF FINAL JUDGMENT

Defendant Richard Pachtmann brought this motion "...[t]o dismiss the action because the complaint fails to state a claim...upon which relief can be granted," pursuant to Federal Rules of Civil Procedure 12(b)(6). The issue raised by Pachtmann is whether he is immune from liability under the Civil Rights Act, 42 U.S.C. § 1983, et seq., by virtue of the doctrine of prosecutorial immunity.

After a jury trial in the Superior Court of the State of California, County of Los Angeles, plaintiff was convicted of first degree murder and assault with a deadly weapon with intent to commit murder; he was sentenced to death on the murder charge and to a term of imprisonment not to exceed ten years on the assault ch arge. The judgment was affirmed by the California Supreme Court, People v. Imbler, 57 Cal. 2d 711, 21 Cal. Rptr. 568, 371 P.2d 304 (1962), and, thereafter, plaintiff petitioned the California Supreme Court

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for a writ of hebeas corpus which was denied, In re Imbler, 60 Cal. 2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963), cert. denied, 379 U.S. 908, 85 S.Ct. 196. Later, plaintiff filed a second petition for a writ of habeas corpus in the State Courts challenging the trial court's instructions that in determining the penalty the jury could consider the possibility of parole after seven years imprisonment. Holding that these instructions were improper, the California Supreme Court reversed the judgment imposing the death penalty, In re Imbler, 61 Cal. 2d 556, 35 Cal. Rptr. 293, 387 P.2d 6 (1964), and, on remand, plaintiff was sentenced to life imprisonment on the murder charge.

Plaintiff unsuccessfully sought a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of California, but that Court's denial of the petition was reversed by the Court of Appeals and transferred pursuant to 28 U.S.C. § 2241(d), Imbler v. Craven, 397 F.2d 277 (9th Cir. 1968), to this District where a Judge of this Court granted the petition, Imbler v. Craven, 298 F. Supp 795 (C.D. Cal. 1969), affirmed, Imbler v. California, 424 F.2d 631 (9th Cir. 1970), cert. denied, California v. Imbler, 400 U.S. 865, 91 S.Ct. 100 (1970).

Thereafter, plaintiff brought this action against Pachtmann, the Deputy District Attorney who prosecuted the criminal case in the Superior Court, and certain others. The First Amended Complaint, which the Court permitted to be filed on April 18, 1972, alleges that Pachtmann, along with certain other named defendants, conspired to commit and committed a series of acts of "deliberate malfeasance, misfeasance, non-feasance, failure to inform and correct," all designed to deprive plaintiff of life, liberty and due process of law by unlawfully charging and obtaining his

conviction for murder and assault with intent to commit murder. Pachtmann is alleged to have committed these acts in his capacity as a Los Angeles County Deputy District Attorney and in his individual capacity.

As part of this conspiracy to deprive plaintiff of a fair trial, Pachtmann is alleged, knowingly, to have produced false and perjured testimony prejudicial to plaintiff in that he called as a witness one Costello, a convicted felon who had been committed to an institution for the criminally insane. Costello, allegedly with Pachtmann's knowledge, testified falsely as to his educational background, his mental competence, his purported "viewing of pretrial photographs," and to have given untrue and prejudicial identification testimony implicating plaintiff in the criminal acts charged in his Superior Court trial; Pachtmann allegedly did nothing to correct this use of false and perjured testimony.

It is further alleged that Pachtmann ordered officers of the Los Angeles Police Department to refrain from arresting Costello on a charge of forgery until Pachtmann had concluded his use of Costello as a witness, all of which conduct plaintiff asserts constitutes a traditionally exclusive police activity within the purview of Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965). The First Amended Complaint also alleges that Pachtmann suppressed true and elicited false fingerprint evidence and expert testimony, acted to alter a sketch of plaintiff used for identification purposes, and, with another, suppressed the results of polygraph tests which exculpated plaintiff.

The First Amended Complaint further attempts to incorporate by reference the decision of this Court in Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif. 1969), plaintiff's successful habeas corpus proceeding under 28 U.S.C. § 2254,

and alleges that the findings therein made by a Judge of this Court are binding in the present action. While the Court may, of course, take judicial notice in this proceeding of matters determined in other Court actions, a plaintiff proceeding under 18 U.S.C. § 1983 must allege highly specific facts, not mere conclusory allegations, Weyandt v. Mason's Stores, Inc., 279 F. Supp. 283 (W.D. Pa. 1968), Pugliano v. Staziak, 231 F. Supp. 347 (S.W. Pa. 1964), affirmed 345 F.2d 797 (3d Cir. 1965), and prove these allegations by a preponderance of the evidence, Walyd v. Kane, 283 F. Supp. 450 (E.D. Wis. 1968). Even though a state court adjudication may not, under certain extraordinary circumstances not here present, be res judicata against a plaintiff in a subsequent federal civil rights action growing out of the same incident, Whitner v. Davis, 410 F.2d 24 (9th Cir. 1969), the Court knows of no authority which sanctions, much less requires, that findings in a proceeding under 28 U.S.C. § 2254 be applied as res judicata or collateral estoppel in favor of a plaintiff in a subsequent federal civil rights action growing out of the same incident. Particularly is this so where, as here, the parties defendant are different and there has been no showing of any substantiality of interest between the defendant in the habeas corpus proceeding and the present defendants. Hence, in determining the present motion to dismiss, the Court limited its consideration to the specific factual allegations of the First Amended Complaint and considers that the findings of Imbler v. Craven, supra, as such, have no bearing on the disposition of the present motion.

The question presented by this motion is whether the acts of Pachtmann alleged in the complaint are embraced by the immunity extended to prosecutors acting within the scope and course of their official duties. In determining the

sufficiency of the First Amended Complaint to state a claim upon which relief can be granted, the Court must, of course, accept the allegations of the First Amended Complaint as true and in the light most favorable to the plaintiff. Robichaud v. Ronan, supra, at 534.

Basis for Prosecutors' Immunity

42 U.S.C. § 1983, upon which jurisdiction of the present action is premised, provides:

> "§ 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Jurisdiction for suits brought under § 1983 is vested in the District Courts by virtue of 42 U.S.C. § 1988.

No immunity from liability for the proscribed conduct is mentioned in the statute, but the doctrine of prosecutorial immunity has been engrafted in favor of certain public officials for acts done in the course and scope of their employment. Courts have repeatedly held that public prosecutors are immunized from civil liability for acts done as part of their traditional official functions. Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968); Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964), cert. denied, 379 U.S. 867, 85 S.Ct. 137; Diaz v. Chatterton, 229 F. Supp. 19 (S.D. Cal. 1964); Kostal v. Stoner, 292 F.2d 492 (10th Cir. 1961), cert. denied, 369 U.S. 868, 82 S.Ct. 1032, rehrg, denied, 370 U.S. 920, 82 S.Ct. 1559; Puett v. Detroit, Dept. of Police, 323 F.2d 591 (6th Cir. 1963), cert. denied, 376 U.S. 957, 84 S.Ct. 978; Jennings v. Nester, 217 F.2d 153 (7th Cir. 1954), cert.

denied, 349 U.S. 958, 75 S.Ct. 888.

Several reasons have been advanced in support of prosecutorial immunity: (1) to avoid influencing prosecutorial decisions by threat of civil liability, (2) to avoid deterring qualified persons from entering employment as prosecutors, (3) to avoid wastefully draining prosecutors' time and energy on matters collateral to their prosecutorial functions, and (4) to encourage and enforce honesty and efficiency among prosecutors through ballot and formal removal proceedings rather than civil litigation. See Robichaud v. Ronan, supra, at 536, 537.

Scope of Prosecutorial Immunity

The courts have repeatedly asserted that the immunity afforded prosecutors and other quasi-judicial personnel is equated, in scope, with that afforded Judges. Friedman v. Younger, 282 F. Supp. 710 (C.D. Cal. 1968); Clark v. State of Washington, 366 F.2d 678 (9th Cir. 1966); Robichaud v. Ronan, supra.

This immunity is not, however, without limit and under some circumstances prosecutors lose their immunity if their acts are beyond the scope of the prosecutorial function. Robichaud v. Ronan, supra; Corsican Productions, Inc. v. Pitchess, 338 F.2d 441 (9th Cir. 1964). Thus, neither the title under which a prosecutor acts nor the characterization of his activities will suffice to bring him within the scope of the privilege. See Robichaud v. Ronan, supra. Instead, the Court of Appeals of this Circuit has said:

> "[t]he trial court must determine the nature of the acts alleged to have been wrongfully committed.... If...the commission of acts...are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them."
>
> Robichaud v. Ronan, supra at 537.

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In Robichaud, upon which plaintiff relies, defendants prosecuted plaintiff on a charge of first degree murder. The complaint was filed with malicious motive and without probable cause, and pursuant to the charge plaintiff was arrested and placed in custody for a non-bailable offense. During her imprisonment plaintiff was taken to another county, the scene of the alleged crime, and without being afforded counsel, was threatened and intimidated in an unsuccessful effort to obtain her confession. Though there was insufficient evidence to establish probable cause for the crime charged, defendants refused to dismiss the complaint, refused to produce evidence or to proceed with a preliminary hearing and, thereby, deprived plaintiff of her rights. Robichaud v. Ronan, supra, at 534, 535.

Whether Robichaud answers the question here presented is unclear. It appears to affirm the traditional doctrine that acts within the course and scope of the prosecutorial function remain privileged, but the holding does not distinguish between those allegations of the complaint in Robichaud which come under the privilege and those which do not. Indeed, many of the acts upon which the complaint therein appears predicated would seem to be acts well within the traditional scope of prosecutorial activity. Moreover, the Court stated that a prosecutorial immunity ceases to exist when the prosecutor is no longer functioning as such, but is instead, engaging in conduct usually associated with police activity. Robichaud v. Ronan, supra, at 536. This distinction is easier to draw than to apply. For example, investigation and interrogation of witnesses, including the accused may properly be part of the prosecutorial activity though this activity is also associated with police activity. It is not clear from Robichaud whether prosecutors are to be

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immune from civil liability only for part of their traditional functions and, if so, whether this does not, in effect, completely undermine prosecutorial immunity. In the context of the Robichaud case it would appear that malfeasance by way of gathering and presenting perjured testimony would come within the ambit of the privilege while directing an arrest on the basis of such testimony would not lay within the privilege. See Robichaud v. Ronan, supra, at 537.

Sufficiency of the Pleadings

Though the matter before the trial court in Robichaud was, as here, a motion to dismiss the complaint, the Court of Appeals stated:

> "[t]he trial court must determine the nature of the acts alleged to have been wrongfully committed, for the appellees may have abandoned their 'quasi-judicial' role. If they, so doing, committed acts, or authoratatively directed the commission of acts, which ordinarily are related to police activity as opposed to judicial activity, then the cloak of immunity should not protect them."
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> Robichaud v. Ronan, supra, at 537

But the test appears to be, not whether the prosecutor acted wrongfully, but rather, whether the acts were committed by him in the performance of functions of the sort normally regarded as part of the prosecutor's role under the judicial process.

Since prosecutorial functions and duties often and inevitably overlap with and are related to police activity, the nature of a prosecutor's acts need to be evaluated in light of all the facts and circumstances present and, hence, it would appear, require inquiry into the merits of the case. The mystery here is how a determination can be made on a motion to dismiss (which function is merely to test the legal sufficiency of the allegations of the complaint) if the trial court

is required to adjudicate the merits of plaintiff's case. It appears that the logical inference to be drawn from Robichaud is that dismissal under Fed. R. Civ. P. 12(b)(6) is not proper in a case involving prosecutorial immunity.

If this correctly interprets the effect of Robichaud then the present motion to dismiss must, of course, be denied. But because the complaint in this case lacks specific allegations of police-type activity by Pachtmann, it would appear that Pachtmann should be dismissed if Fed. R. Civ. P. 12(b)(6) may be applied.

The complaint does allege that Pachtmann requested police officers to refrain from arresting a witness at Imbler's trial until Pachtmann had an opportunity to complete his examination of the witness. But this act appears to have been in furtherance of Pachtmann's alleged attempt to elicit courtroom testimony against Imbler and does not appear to have an independent basis for being deemed police activity such as was the case in Robichaud. There, plaintiff was caused by the prosecutor and police officers to be removed from jail, taken to the scene of the purported crime and there intimidated, unsuccessfully, in an attempt to obtain her confession. A much more substantial nexus between the alleged offending conduct of the prosecutor and police activity existed in Robichaud than is here presented. The only other basis for connecting the conduct charged in the present complaint with police activity is the alleged attempt to ascribe certain fingerprints and police sketches as those of Imbler. Though Pachtmann is not specifically charged with this conduct, it is alleged that he is "chargeable under federal law" with this conduct carried out by others.

Except for the portions of the complaint above referred to, the remaining allegations state, in substance,

that Pachtmann produced perjured and false testimony in an attempt to convict Imbler. In other words, the prosecutor is alleged to have acted badly, perhaps wrongfully and even maliciously. Regardless of how limited the scope of prosecutorial activity may properly be, it would appear that the production of testimony is well within the traditional function of prosecutors no matter how wrongfully done and, hence, within the prosecutorial privilege.

For the foregoing reasons, the Court considers dismissal under Fed. R. Civ. P. 12(b)(6) is proper, and therefore,

IT IS ORDERED that the action be and the same is hereby dismissed as to defendant Richard Pachtmann.

Nonetheless, because of uncertainty whether the application of Fed. R. Civ. P. 12(b)(6) is permissible in light of Robichaud v. Ronan, supra, this Opinion and Order certifies, pursuant to Fed. R. Civ. P. 54(b), that the Court expressly determines that there is no just reason for delay and expressly directs the entry of a final judgment dismissing the action as to the defendant Richard Pachtmann; accordingly,

IT IS FURTHER ORDERED that final judgment be entered herein dismissing the action as to defendant Richard Pachtmann.

IT IS FURTHER ORDERED that the Clerk of the Court send, by United States mail, copies of this Opinion and Order to all counsel herein.

DATED: June 30, 1972

Robert J. Kelleher
United States District Judge

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